ment in proper repair in the event of its being found in disrepair.

It also appears to me that there is an averment here of breach of that duty. On the other hand, I have great difficulty in seeing how, from the somewhat obscure and confused account the pursuer gives of the accident, that it can have occurred in such a way as to render the defenders liable to pay him damages. It is with some regret I have reached the conclusion that the case cannot be withdrawn from a jury, but there have been recent decisions in the House of Lords where it has been made pretty apparent that Scottish Judges in dealing with questions of this kind must be careful not to trespass upon the province of juries. It is because of a certain doubt in my mind whether, if I give effect to my own inclination to hold this action irrelevant, I should be guilty of such an act of trespass, that I assent to the course proposed by your Lordship.

LORD ANDERSON—The reclaimers maintained that the action was irrelevant in two respects—(1) that an actionable wrong had not been relevantly averred; (2) that there were no relevant averments of fault implicating the defenders.

On the first point the pursuer's averments are (1) that his foot slipped on a kerbstone causing him to fall and injure himself; (2) that the kerbstone was decayed, defective, and dangerous, the extent to which decay had taken place being specifically stated in inches; (3) that it was this dangerous condition of the kerbstone which caused the pursuer to slip; and (4) that the dangerous condition of the kerbstone had existed for at least one year before the accident. The defenders contended that the pursuer's averments did not disclose that the worn kerbstone was either a trap or a danger, and suggested that the Court should decide now that it was neither. It may be that the pursuer will have difficulty in satisfying a jury that the accident was due to any other cause than a slip of the foot which would have resulted in consequences as serious had the kerbstone been in good order. This is a matter, however, on which it seems to me that he is entitled to have the verdict of a jury unless his averments shew that his case is quite unsubstantial, and in the present case they do not. I am therefore of opinion that an actionable wrong has been relevantly averred for which someone is responsible. As to the second point, the defenders maintained that fault on their part had not been relevantly averred. There can be no negligence if there is no duty, for negligence in a case of this nature is just a breach of duty, and it was contended that the pursuer's averments misdescribe the statutory duties of the defenders with regard to foot-pavements, and that the facts averred do not disclose any breach of duties properly described.

The pursuer's counsel contended that he had relevantly averred a case against the defenders both at common law and under the Glasgow Police Acts. I am doubtful whether a case at common law has been relevantly averred, but I have no doubt that the pursuer has relevantly averred a case of statutory liability. I therefore do not propose to inquire whether or not a common law liability exists. I am not, however, to be held as assenting to the views expressed by the Lord Ordinary as to the extent and measure of the liability at common law of the Corporation with reference to foot-pavements not taken over under the statutes. In view of such a decision as *Threshie* (8 D. 276) I am not satisfied that the Corporation's common law duties as to such foot-pavements have been accurately formulated by the Lord Ordinary.

The statutory liability of the defenders as alleged by the pursuer is thus set forth in his averments—(1) The defenders are bound to inspect the condition of the pavements; (2) if inspection discloses a dangerous condition the defenders are thereupon bound either (*a*) to make the pavement safe themselves or (*b*) to give notice to the frontager proprietor with the object of getting the pavement repaired and made safe by him. The first of these duties is said to be impliedly imposed by the provisions of section 317 of the Act of 1866; the others are said to arise from the direct enactment of that section and from the provisions of section 279 of the same Act and sections 4 and 16 of the Act of 1900. The views expressed by the Lord Ordinary on this part of the case are in harmony with the opinions of Lord Hunter in the case of *Gray* (1915, 2 S.L.T. 203), Lord Blackburn in the case of *Higgins* (1920, 2 S.L.T. 71), and Lord Morison in the unreported case of *Duncan*, January 13, 1923. These opinions seem to me to be sound and ought to be followed. The result is that the Lord Ordinary's judgment should be adhered to.

The Court adhered.

Counsel for the Pursuer and Respondent—Fraser, K.C.—Gibson. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Defenders and Reclaimers—Macmillan, K.C.—Gillies. Agents—Campbell & Smith, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

[Lord Morison, Ordinary.

MURISON *v.* MURISON.

(Reported *ante* 60 S.L.R. 36.)

Jurisdiction — Declarator of Marriage — Alleged Interchange of Consent in Scotland—Defender Domiciled in Scotland at Date of Alleged Ceremony — Defender Domiciled and Resident Abroad at Date when Action Raised—Defender not Cited in Scotland — Jurisdiction ratione contractus.

A woman brought an action of declarator of marriage in which she sought to have it declared that she was married to the defender in Scotland in 1888.

She averred that she and the defender interchanged consent and accepted each other as husband and wife at Edinburgh on 17th August 1888, and that she and the defender thereafter lived together as husband and wife both in Scotland and in England, that she was publicly acknowledged by him as his wife, that on 11th June 1890 a child of the marriage was born and registered by the defender as legitimate, that on the defender obtaining an appointment in South Africa in 1902 she accompanied him to Natal and lived with him there as his wife for nineteen years, that in 1920 the defender went through a ceremony of marriage with another woman in Johannesburg, and that she (the pursuer) and her daughter were compelled to leave him. The defender, whose domicile and residence at the date of the raising of the action were in South Africa, and who had not been personally cited in Scotland, denied the pursuer's allegations as to marriage, and pleaded, *inter alia*, no jurisdiction. It was admitted by the defender that at the date of the alleged ceremony he was domiciled in Scotland.

Held (*rev.* judgment of Lord Morison, Ordinary) that as the defender was not resident in Scotland when he was cited, the Court had no jurisdiction *ratione contractus* to determine the validity of the alleged marriage, and that accordingly the plea of no jurisdiction fell to be *sustained*.

Authorities reviewed.

Mrs Florence Smith or Murison, residing in Edinburgh, *pursuer*, brought an action, against Patrick Murison, medical practitioner and medical officer of health for the borough of Durban, Natal, South Africa, *defender*, for declarator that the pursuer and the defender were lawfully married to each other at Edinburgh on or about 17th August 1888.

The averments of the parties appear from the previous report.

The defender pleaded, *inter alia* — "1. The defender being neither domiciled in, nor resident in, nor cited within Scotland, the Court has no jurisdiction to try the action."

On 6th February 1923 the Lord Ordinary (MORISON) repelled the first plea-in-law for the defender.

Opinion.— "In this case the pursuer seeks a declarator that she was married to the defender at Edinburgh on 17th August 1888.

"Her case is that the marriage though irregularly contracted is valid by the law of Scotland. She avers that for years she has cohabited with the defender as his wife, that the child of the marriage was registered by him as legitimate, and that she has enjoyed until recently the status of the defender's wife. She alleges that she has been compelled to raise this action now because the defender recently deprived her of her said status and has gone through a form of marriage with another woman in South Africa.

"The defender denies the pursuer's story and gives a totally different account of the parties' relationship. He pleads that this Court has no jurisdiction.

"He says—and this was admitted at the bar — that his domicile at the date of the raising of this action was in South Africa.

"On the other hand it was admitted on behalf of the defender that his domicile of origin was Scottish and that this domicile subsisted in the year 1888 and for some years thereafter.

"At the opening of his argument the learned counsel for the defender brought to my notice the opinions which their Lordships of the Second Division pronounced on the reclaiming note of 24th July 1922, and Mr Stevenson said that they amounted to no more than that the Court decided that the award of aliment made in my interlocutor of 18th July 1922 reclaimed against was in the circumstances inexpedient. After carefully considering the opinions of the learned Judges I think this view is correct, and I have the less hesitation in accepting it as no question of jurisdiction was raised before me in the motion roll when I made the interim order.

"I granted the interim decree only for the purpose of giving practical effect in this country to the judgment of a competent British Court, and because I felt unable to resist the presumption in favour of an order for aliment awarded by the Court of the defender's domicile, which, I presumed, would only be pronounced after some evidence of the marriage had been produced.

"Mr Stevenson then argued the question of jurisdiction with great ability and with a fairness which I appreciated very much.

"He said that it was for the pursuer to establish jurisdiction. He pointed out that the summons had been served edictally, and contended that marriage was by Scottish law a contract, that no contract could by itself give this Court jurisdiction over a foreigner, that personal service within the jurisdiction or its equivalent was always necessary, that there was no binding authority which supported the jurisdiction of this Court, that the doctrine of the matrimonial domicile had been abolished, that the South African Court alone had jurisdiction over the defender, and that the pursuer should have raised her action there.

"I agree so far with the defender's contention that it is for the pursuer to show that this Court has jurisdiction, and the argument in support of it proceeded upon these admitted facts—(1) that the defender was a native of Scotland; (2) that the defender's domicile and the pursuer's residence were at the date of the alleged marriage in Scotland.

"The authorities on the question are few in number. They are all anterior to the Scottish statutes which deal with irregular marriages and their registration. Judicial opinion seems to have been conflicting, and the difference of view is well illustrated by the case of *Dodds* v. *Westcomb* (M. 4793), in which a decree of declarator of marriage was pronounced against an Englishman whose domicile both at the date of the marriage and of the action was in England.

"This decision is referred to apparently with approval by Ersk. Inst. i, 2, 20.

"If the summons in that case were served personally on the defender while within the jurisdiction, or if arrestments *ad fundandam jurisdictionem* had been laid, its decision is quite consistent with the judgment of the Whole Court in *Wylie* v. *Laye*, 12 S. 927.

"The majority of the Court in *Dodds'* case were not of opinion that the *locus contractus* founds a forum, and so I think arrestments must have been used. But it is clear that the Court recognised the contract of marriage as in a special position because a *quæstio status* was involved. I think, however, it follows from the judgment in *Wylie's* case that if the defender here had been cited in Scotland or arrestments *ad fundandam jurisdictionem* had been used, the Court would have sustained its jurisdiction. This conclusion is inconsistent with the decision in the prior case of *Scruton* (M. 4822), where goods belonging to the Irish defender had been attached by arrestment.

"I think the only case which applies to the present one is the case of *Mackenzie* v. *Mackenzie*, March 8, 1810, F.C. This was an action of declarator of marriage in which the defender was a domiciled Scotsman at the date of the alleged marriage in or about 1797. The parties lived habit and repute as husband and wife until 1807, when the defender deserted his wife and children and settled in Manchester. She appears to have raised her action about the year 1810, and the Court repelled the defender's plea of no jurisdiction and granted decree. As I read the report of the case, the defender never returned to Scotland after 1807, and there is no suggestion that arrestments to found jurisdiction were laid.

"This judgment, so far as I have been able to ascertain, has not been commented upon in any subsequent decision. I think it is binding upon me, and I must repel the defender's first plea-in-law.

"My impression is that Mr Stevenson admitted the application of *Mackenzie's* case, but he pointed out that its authority was disavowed by Lord Fraser at p. 1273 of Husband and Wife, and contended that the judgment was unsound in principle. As I heard a full argument on this very important subject I think I ought to express my view on it.

"Lord Fraser seems to treat the judgment in *Mackenzie's* case as *in pari casu* with that of *Dodds* v. *Westcomb*, of which Erskine approved. In combating Erskine's reasoning Lord Fraser says—'This reasoning is erroneous because the pursuer's status could not be declared without affecting that of the absent Englishman over whom the Court had no jurisdiction. Yet the opinion receives support from an English decision where the Court sustained its jurisdiction to try the validity of a marriage entered into in England between two French people, though the domicile was in France, where the defender was resident, and the citation was given to him not in France but at Naples, where he happened to be at the time. The sole ground of jurisdiction was that England was the place of the contract.'

"But in *Dodds'* case the defender was throughout his life a domiciled Englishman. In *Mackenzie's* case, in addition to the *locus contractus*, there were two additional facts which are held to be elements in establishing jurisdiction—(1) that Mackenzie was a native of Scotland, and (2) that he was a domiciled Scotsman at the date of his marriage.

"In the recent case of the *Glasgow Corporation* v. *Johnston*, 1915 S.C. p. 555, the Lord President dwells on the importance of the nativity of a defender as an element in sustaining the jurisdiction of this Court in an action of damages arising *ex delicto*. In that case the summons was served upon the defender edictally, and I think the Court would necessarily have reached a different conclusion if the defender had not been a native of Scotland and domiciled in Scotland at the date of the delict.

"Before I refer to some recent cases in which I think that jurisdiction has been founded on the *locus contractus*, I should like to point out that in my opinion the judgment in *Mackenzie's* case does not in any way countenance the doctrine which was at one time known as 'the matrimonial domicile' for the purposes of divorce recognised in *Jack* v. *Jack* (24 D. 467), and finally destroyed by the opinion of Lord Watson in *Le Mesurier*, 1895 A.C. 517. It is admitted that the defender's domicile is in South Africa. If the pursuer is his wife, her domicile became Scottish on her marriage, and now is South African. The marriage, if it exists, could only be dissolved by a decree of the South African Courts on grounds recognised by South African law. Similarly the spouses' rights of succession and other rights which flow from the marriage must be determined by the law of Natal. The present action does not deal with any right which flows from the marriage. It deals with the existence and validity of the marriage itself. The pursuer says that a valid marriage was contracted, and the defender alleges the contrary.

"I think that when the status created by the marriage is challenged *ab initio*, the important date is the date of the marriage, and not as in a summons of divorce the date of the raising of the action. In actions of divorce the *lex domicilii* must be applied. In actions which raise the question of the validity of the marriage the *lex loci contractus* must be applied.

"When the marriage itself is successfully impugned in a nullity suit, it can, I think, with accuracy be said that the status of the defender is affected by the decree. When it is sought to establish the existence of a marriage the validity of which is disputed, the case is exactly the converse of a nullity suit, and it is difficult to see that there is a logical reason for making a distinction in the principles which should regulate the Court's jurisdiction in the two cases.

"There are a number of judgments where the Courts in Scotland and England have annulled marriages contracted in Scotland and England respectively, even although

the domicile of the husband was foreign at the date of marriage, and even although the Court would not have had jurisdiction against him in an action of divorce or in an ordinary action for debt.

"I was referred to the case of *Smith* v. *Deakin* (1912, 1 S.L.T. 253), in which the Lord Ordinary held that this Court had jurisdiction to try the validity of a marriage contracted in Scotland though both parties were domiciled in England both at the date of the alleged marriage and the date of the raising of the action. It is true that in that case the summons was served upon the defender personally and he did not defend. It does not appear from the report whether the service was effected in Scotland or not, but I do not think the ground of judgment was affected by the form of the citation. I remember another recent case in the Outer House where the daughter of a well-known Peer obtained a decree of nullity in similar circumstances, where—if my recollection is accurate—personal service on the defender or the arrestment of his property was impossible.

"There are a series of cases in English law where the English Courts have annulled marriages contracted in England by foreigners not domiciled in England, on the principle that the issue raised was one as to the validity of a marriage itself contracted in England. In the case of *Niboyet* v. *Niboyet* (4 P.D. 1) the Master of the Rolls said that the principles applicable to the dissolution of marriage did not apply to nullity suits, and that in these cases the validity of the ceremony was to be determined according to the law of the place in which it was celebrated.

"In *Simonin* v. *Mallac* (1860, 2 Sw. & T. 67) the English Court sustained its jurisdiction to try the validity of an English marriage entered into between two domiciled French people. The defender was cited in Naples. This is the case in which the judgment appears to be challenged by Lord Fraser in the passage above quoted. The judgment was, however, approved and followed in the case of *Ogden*, 1908 P. 46, and *Ogden's* case was followed in *De Montaigu*, 1913 P. 154.

"I do not think it is possible to reconcile Lord Fraser's opinion and his criticism of *Simonin's* case with the decisions of the judges both in England and Scotland in nullity suits. On the other hand, if actions to declare that a marriage is null are on the question of jurisdiction *in pari casu* with actions to declare that a marriage exists, then the *locus contractus* is by itself sufficient to lay a foundation for jurisdiction. I am, however, unable to hold that the judgment in *Mackenzie's* case can be supported on this ground *per se*, because the decision of the Whole Court in the case of *Wylie* laid it down definitely that this was not the law.

"From the public point of view there is in my opinion expediency and propriety in holding that the forum for all actions in which the existence or validity of a marriage is in issue should be in the country of the place of marriage. This gives either spouse an equal right to invoke the jurisdiction of this Court. If the defender in *Wylie's* case had invoked the jurisdiction of this Court either in an action of freedom and putting to silence or in an action of declarator, the question as to the existence of the marriage must have been decided. On the other hand it appears to be somewhat anomalous that the wife's right to have her status declared by the courts of the country of his birth—the law of which permitted the marriage to be contracted—should be made to depend upon whether she can serve her summons of declarator personally on the defender in Scotland or can attach his moveable property.

"The difficulties which arise, and the necessity for the counter-assertion of the jurisdiction of the court of the *locus contractus* where a foreign court has annulled a marriage contracted in England on grounds which its law does not recognise, are well illustrated in the case of *Stathatos*, 1913 P. 46. It appears to be the law of England that the English Courts have jurisdiction to determine the validity of all marriages contracted in England. I understand the law of England prevails in Natal and most of British South Africa. If the English rule were adopted in Scotland as regards all marriages contracted in Scotland, I think that difficulties which arise from the special character of our marriage law would disappear.

"The report in *Mackenzie's* case contains no suggestion either that the summons was served on the defender personally or that arrestments to found jurisdiction were laid. If the summons were served only edictally, as I think it must have been, I venture to hold that the judgment is sound.

"Mackenzie was a native Scotsman and domiciled in Scotland at the date of his marriage. I think this Court must necessarily have the power to declare the existence of his marriage, contracted as it was at a date when his domicile was in Scotland. No other court in my opinion could competently do so. My information is that a declarator of marriage is unknown in the forms of process in the English Court—*vide* the opinion of Lord Brougham in *Mansfield* v. *Stuart*, 5 Bell's App. 139, which is commented on by Sir Samuel Evans in *De Gasquet*, 1914 P. 69. I understand, however, that an English or other foreign court may inquire into the *de facto* existence of a Scottish marriage if the husband subsequent to its date had acquired a domicile within the court's jurisdiction.

"I think such inquiry is necessary where the question raised in the action depends on the *lex domicilii*, as, for example, in cases of divorce or succession or in the many questions that may arise from the marriage. Even if the husband has not acquired a domicile within the jurisdiction of a foreign court, it may also inquire into the fact of marriage for the purpose of giving an order protecting the person of a wife or awarding her interim aliment. But I know of no principle in international private law and no authority for the view that a foreign court will sustain its jurisdiction in order to declare the existence and validity of an

irregular marriage contracted by a Scotsman at a time when his domicile was Scottish.

"Erskine (Inst. i, 2, 2) defines jurisdiction as 'a power conferred on a judge or magistrate to take cognisance and determine debatable questions according to law and to carry his sentences into execution.'

"I think it is of the essence of all jurisdiction that the judge should have power to enforce the just and legal rights of all persons domiciled within his territory which arise from contracts entered into there. In my view the broad test of whether there is jurisdiction or not depends upon whether the Court can pronounce a judgment which will be effective within its territory.

"It has often been pointed out that the reason why this Court declines jurisdiction over foreigners who have entered into ordinary business contracts in Scotland arises from the practical obstacle to the enforcement of a Scottish judgment by neither the person nor the estate of the defender being within this territory. Hence arises the necessity in these cases for personal service, the use of arrestments *ad fundandum jurisdictionem*, or the ownership or possession of Scottish heritage.

"I humbly think that none of these considerations apply when the Court is asked to declare the status of a Scotsman which was established by the marriage he contracted in Scotland when his domicile was there. It is not open to doubt that the pursuer could competently have raised this action in the year 1888 or 1889 while the parties are alleged to have cohabited in Scotland, and I cannot see any principle upon which the jurisdiction of this Court is extinguished because in the meantime the Scottish husband has changed his domicile. The marriage—if there is a marriage—subsists as a valid Scottish marriage throughout the husband's changes of domicile, and in my opinion the jurisdiction of this Court to grant a decree of declarator is available at any time not merely during the subsistence of the marriage but even after it is dissolved. A declarator of marriage is a competent process in this Court at the instance of any interested party even after the death of either or both spouses.

"The subsistence of the jurisdiction of the Scottish Courts in connection with the rights arising from marriages of domiciled Scotsmen is exemplified in the cases where a wife raises a summons of divorce for desertion under the statute.

"In virtue of the statute the wife has an absolute right to decree if its requirements are satisfied.

"This Court must in my opinion have jurisdiction to make that right effectual even if, as is quite possible, the defender has changed his domicile during the period of desertion. And yet it is clear under the recent decision of the *Lord Advocate* v. *Jaffrey* (1921, 1 A.C., p. 146) that even then the wife's domicile follows that of the deserting husband. I think the ground of jurisdiction in such a case does not rest upon the doctrine of a matrimonial domicile, but arises *ex necessitate*, and is implied from the status which the pursuer held as the wife of a domiciled Scotsman and her statutory right to obtain a divorce.

"In the case of *Pabst* (6 S.L.T. 117) Lord Low granted a decree of divorce against a German who had married a Scotswoman and acquired a Scottish domicile. He deserted his wife and returned to Germany, and his Lordship held that this did not deprive this Court of its jurisdiction or the pursuer of her statutory remedy.

"I think this decision has regulated the practice in the Outer House. In the exercise of this jurisdiction the Court makes no distinction between cases in which the defender has been served personally or convened edictally. By analogous reasoning it humbly appears to me that, if a woman is married in Scotland to a domiciled Scotsman in Scotland, the jurisdiction of the Court remains to declare her status thus acquired whenever it is questioned, and whether the husband has or has not in the meantime acquired a domicile of choice.

"If there was a marriage between the pursuer and defender an implied obligation was imposed upon the parties to take proceedings to register it in terms of section 2 of the Marriage (Scotland) Act 1856. A declarator of marriage is a proceeding for ascertaining the existence of the fact of the marriage at its true date, and a decree of this Court is alone the warrant for the registration of the marriage under section 40 of the Statute of 1849.

"The Register of Marriages is maintained on the authority exclusively of Scottish statutes. It is under the control of this Court, and it is I think the duty of the Court to see that its records are accurate and complete. I am unable to see that any foreign court could give the pursuer the remedy she asks here. I am satisfied that no order of a foreign court could be used as a warrant for recording the entry of a marriage in the Scottish Register of Marriages.

"The registration system was not established when the case of *Mackenzie* was decided, but the operation of the Scottish statutes on this subject and the duty imposed on this Court in regard to them seem to me to be an additional ground for maintaining that its judgment proceeds on sound principle.

"I think I need not elaborate the distinction between ordinary business contracts and the contract of marriage. Ordinary contracts impose obligations solely between the contracting parties *hinc inde*.

"The contract of marriage is a contract *sui generis*. It imposes obligations of a special character. It creates a status which affects not merely the contracting parties but their children and respective families as well. A decree of declarator of marriage is in one sense a decree against the defender, but it merely declares his status. It does nothing more. The obligation to record the marriage in the register is imposed by the statute on the Clerk of this Court. The obligations and rights which flow from the status fall, in my opinion, to be enforced

solely by the courts of the husband's domicile and in accordance with the *lex domicilii*.

"The case of *Browne* v. *Burns* (5 D. 1288) is one of the leading authorities on the question of interim aliment. Lord Moncreiff was among the dissenting judges on the question of aliment, but he made some important observations on the law of irregular marriages contracted by Scottish spouses.

"'If,' he says at p. 1294 of the report, 'the material fact' (that is the marriage) 'is proved by the documents it is very marriage without the necessity of any process, and the children of such a union could establish their legitimacy after the death of one or both of their parents though no declarator of marriage had ever been brought in their lifetime. In this the case differs from another which is often confounded with it—that of a marriage by promise *subsequente copula*—which by due process may be reduced into marriage as furnishing a legal ground for declaring a marriage to have been thereby constituted. But the difference is great in this point that declarator is essential to the constitution of marriage in that case, and that if no such declarator be brought in the lifetime of both parents the marriage can never be established afterwards. It is not at all so in regard to written declarations of marriage *de presenti* or declarations of such consent to marriage before witnesses. These may be effectually proved at any time.'

"The learned Judge is speaking only with reference to the jurisdiction of this Court, and I am inclined to think that his Lordship would not have expressed his opinion in such unqualified terms if this Court's jurisdiction were liable to be limited or extinguished by the voluntary act of the husband in changing his domicile.

"In my opinion an inherent jurisdiction remains with this Court to declare at any time the existence of a marriage contracted *de presenti* in Scotland by a domiciled Scotsman at the instance of any party who can qualify a sufficient title and interest to raise a declarator.

"I desire to add that I think the argument in this case has raised questions of the highest importance, and it may be that the rules laid down by the Court in *Wylie's* case so long ago as 1834 require reconsideration in view of modern decisions."

The defender reclaimed, and argued — Where the parties had a common domicile the proper court to determine questions of status was the court of that domicile—*Le Mesurier*, [1895] A.C. 517. The defender's domicile was now South African, and consequently it was the South African Court which had jurisdiction to decide this suit. The pursuer's contention that the Scottish Courts had on the analogy of contract a concurrent jurisdiction with the South African Court to entertain this declarator was not sound, for it was well settled that the mere fact that a contract had been made within the jurisdiction did not make the Court a competent forum unless the defender had been personally cited within the jurisdiction—*Tasker* v. *Grieve*, 8 F. 45; *Glasgow Corporation* v. *Johnston*, 1915 S.C. 555. Here the defender was both domiciled and resident in South Africa, and the only court with jurisdiction was the court of the domicile. Moreover, in regard to the contract of marriage it was laid down by the Whole Court in the case of *Wylie* v. *Laye*, 1834, 12 S. 927, that the mere circumstance of the marriage having taken place in this country did not give the Court jurisdiction. It was true that in England the Courts entertained actions in regard to the validity of marriages celebrated in England. But there the Courts proceeded on the view that the mere fact that a contract had been made in England conferred on the Court jurisdiction over the parties to it. In the case of *Ogden*, [1908] P. 46, it was laid down that it was always for the English Court to determine whether a marriage celebrated in England was or was not valid in England—that is to say, the Court considered only the English validity of the marriage, and not its international validity. But this view had never been adopted by the Scottish Courts. And even if it had been, the Court would require first of all to determine whether a marriage had taken place, which was the very question at issue, *i.e.*, before it could pronounce on the question of jurisdiction, it would be compelled to decide the case one way or the other upon the merits. The pursuer here could not, therefore, succeed on the ground of contract. The alternative contention which went upon status was equally inadmissible. The analogy from divorce upon which the pursuer relied was not in point here, because it applied only where there had been a matrimonial offence committed in Scotland, as in the case of adultery, or initiated there, as in the case of desertion. Then when there occurred both a matrimonial offence and a subsequent change of domicile the defender was barred from pleading that change of domicile which he had himself brought about—*Mackenzie* v. *Mackenzie*, March 8, 1810, F.C.; *Jack* v. *Jack*, 1862, 24 D. 467, at pp. 476-477; *Mackinnon's Trustees* v. *Inland Revenue*, 1920 S.C. (H.L.) 171; *Redding* v. *Redding*, 15 R. 1102, *per* Lord Maclaren, at p. 1104; Duncan and Dykes' Principles of Jurisdiction, p. 169. But the analogy could not be used here where no matrimonial offence had been committed within the jurisdiction. The pursuer relied upon a series of nullity cases decided by the English Courts, of which the leading case was *Simonin* v. *Mallac*, 1860, 2 Sw. & T. 67. But there was no authority to sanction the Scottish Courts following the English practice and sustaining their jurisdiction to entertain nullity suits of marriages celebrated in Scotland on the basis of contract without regard to domicile. And in any event declarator suits differed in two respects from nullity suits. First, in the former the question on the merits had to be answered before the preliminary question of jurisdiction could be disposed of, whereas in the latter there was *prima facie* proof of a contract. Second, in nullity suits the parties had a common court of domicile but they had not in

declarators of marriage. As for the system of registration of marriages which had been introduced in Scotland since *Wylie's* case, that alone could not confer on the Court a jurisdiction it did not otherwise possess. Accordingly the Court here had no jurisdiction to entertain this action. The defender also referred to the following authorities:—*Dodds* v. *Westcomb*, 1746, M. 4793; *Scruton* v. *Gray*, 1772, M. 4822; *Pirie* v. *Lunan*, 1796, M. 4596; *A B* v. *C D*, 1887, 25 S.L.R. 736 (O.H.), Lord Fraser; *Smith* v. *Deakin*, 1912, 1 S.L.T. 253; *De Montaign*, 1913, P. 154; *Stathatos*, 1913, P. 46; *De Gasquet*, 1914, P. 69; *Sottomayor* v. *De Barros*, 1877, 2 P.D. 81, 3 P.D. 1, 5 P.D. 94; *In re King's Trade Mark*, 1892, 2 Ch. 462, at p. 483; Ersk. Inst., i, 2, 20; Huber, book v, table i, 28 (dealing with topic *de foro competente*); Fraser, Husband and Wife, p. 1271 (2nd vol.); also Maclaren's Court of Session Practice, p. 60.

Argued for the respondent—*Le Mesurier* (*cit. sup.*) was not a binding authority in determining whether marriage had taken place or not, for the Court there had in contemplation only the matter of divorce, and accordingly where it was the constitution of a status that had to be determined its reasoning was not applicable. The proper Court to decide in regard to the validity of a marriage was the Court of the country where the marriage took place, and the Scottish Courts had an inherent jurisdiction to declare the existence of a marriage contracted in Scotland by a domiciled Scotsman whether or not he changed his domicile afterwards. Consequently in actions of declarator of marriage jurisdiction depended on the husband's domicile at the time the marriage was contracted and not on his domicile of succession. The adoption of any other principle would lead to this result, that people might in one country be regarded as married while in another they might not. Further, the pursuer could not be subjected to the jurisdiction of a foreign court until the validity of the marriage was recognised, for only then did that court become the court of her domicile. Counsel also referred to *Mettlenburg*, 1914, P. 53, *per* Sir S. Evans at p. 69; *Buchanan* v. *Wylie*, 16 S. 82.

At advising—

LORD JUSTICE-CLERK—The question in this case is, as Mr Stevenson aptly expressed it, whether a Scottish Court has jurisdiction to determine whether two domiciled South Africans are married or not. That question arises in this way. The pursuer avers that on 17th August 1888 in Edinburgh she and the defender, who was then a medical student at the university there, interchanged consent and accepted each other as husband and wife. She further avers that she and the defender thereafter lived together as husband and wife both in Scotland and in England, that she was publicly acknowledged by him as his wife, and that on 11th June 1890 a child of the marriage was born. The pursuer proceeds on record to say that in 1902 the defender obtained the position of medical officer of the borough of Durban in Natal; that she and the defender and their daughter took up residence there; that in South Africa also the defender avowed her to be his wife, and that they lived together at bed and board there for nineteen years. On 15th April 1920, says the pursuer, the defender went through a ceremony of marriage in Johannesburg with a woman named Freda Andrews, and in consequence of this fact and his drunken habits the pursuer and her daughter ceased to live with him. The pursuer, who is now resident in Edinburgh, finally avers that, as the defender denies that she is his wife, and contends that she has all along been his mistress, she has raised the present action of declarator of marriage.

The defender maintains that the pursuer's averments are irrelevant to infer jurisdiction in this Court to determine the matter, inasmuch as there is no averment of personal citation of the defender in Scotland, no averment that he is now domiciled there, and no averment that the Courts of South Africa have no power to afford the pursuer the remedy which she seeks.

It is admitted by joint minute for the parties (1) that at the date of the alleged ceremony the defender was domiciled in Scotland, and (2) that he is now domiciled in South Africa.

The question raised is no doubt one of importance to the pursuer and also to her daughter, for their good name is directly challenged by the defender. It is also of manifest importance to him, because if the pursuer is right he is a bigamist and Freda Andrews is not his wife.

The Lord Ordinary, proceeding on the case of *Mackenzie* v. *Mackenzie* (8th March 1810, F.C.), has repelled the defender's plea to jurisdiction, and against that decision this reclaiming note is taken.

The reclaimer's counsel maintained that, viewing the alleged marriage from the point of view of contract, in order to constitute jurisdiction in the Scottish Court, not only must the contract have been formed in Scotland but the defender must also have been cited in Scotland. He further maintained that, viewing the alleged marriage as involving a question of status, Scotland must be the domicile of the defender at the date of raising the action in order to confer jurisdiction on the courts of this country. He contended that the authorities establish both these propositions.

Dealing with the latter contention first, I would observe that it was based solely upon the case of *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517. The headnote in that case bears that "the permanent domicile of the spouses within the territory is necessary to give to its courts jurisdiction so to divorce *a vinculo* as that its decree to that effect shall by the general law of nations possess extra-territorial authority." The decision thus exploded the loose and specious doctrine of matrimonial domicile. But it must be remembered that the Court was dealing only with jurisdiction in actions of divorce, and that Lord Watson's observations are carefully limited to that type of case. Their Lordships concluded, says Lord Watson

([1895] A.C. at p. 540), "that according to international law the domicile for the time being *of the married pair* affords the only true test of jurisdiction to *dissolve their marriage*." I cannot regard that case as an authority for the proposition that where the validity of the marriage is denied equally as in a case where the validity of the marriage is admitted the only court possessing jurisdiction is that of the country where the parties are domiciled at the date when the action is raised. The considerations which arise are by no means the same. I am not accordingly much impressed by Mr Stevenson's first contention.

But it was strenuously maintained for the reclaimer that in any event in order to constitute jurisdiction in the Scottish Courts, not only must the alleged contract have been formed in Scotland, but that the defender must have been cited in Scotland, and inasmuch as it is not averred that the defender in this case was cited in Scotland—indeed it is not disputed that he was cited in South Africa—the defender maintains that the action so far as jurisdiction is concerned is irrelevantly laid. Now if the question were open I should *prima facie* be disposed to think that citation within the territory, at anyrate nowadays, is an idle formality, and that it might well be dispensed with as an essential preliminary to founding jurisdiction. The requirement would seem to be a survival of the times when the defender on citation was forthwith hailed to the judgment seat, where he remained pending the determination of his suit. Needless to say that procedure belongs to the forgotten ages. To-day in the course of an hour after citation the defender may be beyond the jurisdiction of the court. The requirement, if requirement it be, would therefore appear, like many another, to be one which has outlived the reason of its institution. But a careful review of the authorities satisfies me that the requirement cannot be so lightly regarded. It would appear to be deeply rooted in our system of jurisprudence. I now proceed to consider these authorities, with a full citation of which we were favoured by the bar.

The first case is that of *Dodds* v. *Westcomb*, (1745) M. 4793. There as here the action was one of declarator of marriage and adherence. It was raised by a Scotswoman against an Englishman. The defender maintained that as he was an Englishman and had no effects in Scotland, though at the date of the alleged ceremony he resided in Scotland, the Court had no jurisdiction over him. The objection was repelled. The decision proceeded on grounds of pure expediency. The report bears that the Lords "repelled the declinator, 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* save when the party is summoned upon the place." Nevertheless, on the grounds of pure expediency set out in the report, the Court by a majority repelled the declinator. It is not, if one may say so with respect, an illuminating or impressive decision.

It is referred to by Erskine in his Institutes (i, 2, 20) in somewhat significant terms. He says—"Civil jurisdiction is also founded *ratione contractus* if the defender had his domicile within the judge's territory at the time of entering into the contract sued upon, though he should not have his domicile there when the action is brought against him. But it is necessary in order to establish jurisdiction in this manner *that the defender be actually within the judge's territory, and be cited by a warrant issuing from his court*, or at least that he have effects lying there; for jurisdiction cannot have the least operation when both the person and the estate of the defender are withdrawn from the judge's power." He then goes on to refer to what he terms the "singular case" of *Dodds* v. *Westcomb*, and proceeds, so I read his comments, to whittle away its authority as a decision on the point which is now in issue. Indeed, the editorial note to the paragraph in question bears—"This judgment has not been followed as a precedent."

The next case is that of *Scruton* v. *Gray*, (1772) M. 4822. The action there was also one of declarator of marriage, and it was directed against a student in Cork. It was argued that inasmuch as the alleged marriage had taken place in Scotland, and arrestment had been effected there, the Court had jurisdiction to entertain the action. The plea was repelled, and the report bears that "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." It is significantly added that, "as to the case of *Westcomb*, . . . 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." Whatever one may think of the last consideration as a ground of judgment, it is at least clear that thus early was the authority of that decision challenged, and, as we shall see, its value is further discounted in later times.

The case of *Key*, quoted in Fraser on Husband and Wife, vol. ii, 1272 (Arniston Papers, vol. 130, No. 8), next claims attention. That too was an action of declarator of marriage brought by a Scotswoman against a Londoner. Jurisdiction was sustained against him, inasmuch as (*a*) the alleged contract of marriage was formed in Scotland, and (*b*) he had been personally cited in this country. And manifestly from the report great stress was laid upon the latter point.

I now come to the case of *Mackenzie*, on which in effect the Lord Ordinary bases his judgment. The rubric in that case bears—"Two native-born subjects married in this country, action of declarator at the wife's instance sustained against the husband domiciled in England." It does not appear from the report that a plea that the defender had not been cited in Scotland was urged, but the case certainly appears to be

an authority for the proposition that if Scotland is the *locus contractus*, that is sufficient in itself to constitute jurisdiction on the part of the Scottish Courts. The case appears to be a special one, and much more attention appears to have been paid to its merits than to the preliminary plea to which I have referred. Lord Fraser, who says (Husband and Wife, vol. ii, 1274) "It is now required that besides the fact of contract there shall also be personal citation in the country of the contract," appears to regard the case as "not now authoritative" (Husband and Wife, vol. ii, 1275, note *a*).

I shall next consider what I regard as the most important case of the series, viz., *Wylie* v. *Laye*, 12 S. 927. It was there held by the Whole Court on a full review of the authorities, including *Dodds* and *Mackenzie*, that "a party (is) not bound to answer in Scotch Courts a summons of declarator of marriage alleged to have been contracted in Scotland, he not being cited personally within Scotland, but edictally, and having no domicile of citation therein." The reason why the case was considered by the Whole Court was because "the decisions were in some instances inconsistent with each other." And it was solemnly decided—"Although the alleged marriage between the pursuer and defender is stated to have been contracted in Scotland, we are of opinion that the *locus contractus* does not lay a foundation for a jurisdiction over a foreigner unless he has been cited in this country, or in some cases unless his funds have been arrested here *jurisdictionis fundandæ causa*." I regard that case as overruling both *Dodds* and *Mackenzie*, as settling the law in the sense contended for by the reclaimer, and as binding upon this Court unless and until its authority is impaired or destroyed by the Court of last resort.

The case of *Wylie* was followed by Lord Fraser in the case of *A B* v. *C D*, 25 S.L.R. 736. There an action was raised against a domiciled Englishman to have it declared that he had entered into a marriage in Scotland by declaration *de presenti*. It was maintained in his defence that there must be personal citation of the defender in Scotland in order to create jurisdiction in the Courts here, and that in point of fact there had been none. In support of that plea the case of *Wylie* was cited. The Lord Ordinary thereupon sustained the plea of no jurisdiction.

I ought also to refer to the case of *Sinclair* v. *Smith* (22 D. 1475), which, though it was an action of damages for breach of contract of marriage, not an action of declarator of marriage, is very much in point. The Court in affirming its jurisdiction against the defender, who was domiciled in England at the date of the promise of marriage and at the date when the action was raised, proceeded on the ground (1) that the contract was alleged to have been entered into in Scotland, and (2) that the defender had been personally cited within the territory. I refer in particular to the observations of the Lord Justice-Clerk on p. 1480 where he says—"It is presence within the territory when the summons is served that is the important fact, combined with Scotch origin or Scotch contract, to found jurisdiction. I am of opinion that the Court has jurisdiction on the ground that the contract, for breach of which this action of damages has been raised, was made in Scotland between two persons then resident and domiciled in Scotland combined with the fact that the defender was found within the territory where he was in regular and competent form cited as defender in the action."

Holding as I do that the defender's contention is in accordance with the law of Scotland as established with regard to actions of declarator of marriage, I forbear from consideration of the English cases cited to us. They are no doubt confusing and difficult to reconcile. In any event one would have to handle them with care in dealing with a question of Scottish procedure such as concerns us here. For the same reason I consider that I am exempt from the necessity of reviewing the analogies drawn from cases relating to divorce and declarator of nullity of marriage upon which stress was laid in argument. As analogies they are not free from danger, for as Mr Stevenson pointed out different considerations from those which obtain in actions of declarator of marriage come into play in deciding such cases.

I think there are here no relevant averments of jurisdiction, that accordingly the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

LORD ORMIDALE concurred with Lord Hunter.

LORD HUNTER—In this action the pursuer seeks (first) to have it found and declared that she and the defender were lawfully married to each other at Edinburgh on or about the 17th day of August 1888, and that she has since been and now is the lawful wife of the defender, and (second) to have the defender ordained to adhere to her as his lawful wife. According to the pursuer's averments, on or about 17th August 1888 she and the defender at Edinburgh interchanged consent and accepted each other as husband and wife. Until 1902 the parties are alleged to have lived together as husband and wife in different towns in Scotland and England. In that year, however, the defender obtained the position of medical officer of the borough of Durban, Natal, South Africa. According to article 13 of the condescendence the pursuer lived with the defender in Durban for nineteen years at bed and board as his wife until 1919, when in consequence of the drunken behaviour of the defender disagreement arose between the pursuer and the defender. On 15th April 1920 the defender went through a ceremony of marriage in Johannesburg with a woman named Freda Andrews. On discovering this, and also in consequence of the defender's drunken habits, the pursuer and her daughter, a child who had been born to the parties in 1890, ceased to live with the defender. Since 10th March 1921 pursuer has not lived

with the defender. The defender denies the pursuer's allegations as to marriage, stating that the pursuer lived with him as his mistress and not his wife. His first plea-in-law is that as he is neither domiciled in, nor resident in, nor cited within Scotland, the Court has no jurisdiction to try the action. The pursuer admits that the defender is now domiciled and resident in South Africa, and that service of the summons was made upon him in that country. The defender admits that in 1888, when the alleged marriage is said to have been contracted, he was domiciled in Scotland.

The Lord Ordinary has repelled the defender's plea to the jurisdiction of the Court on the ground that in his opinion an inherent jurisdiction remains with this Court to declare at any time the existence of a marriage contracted *de præsenti* in Scotland by a domiciled Scotsman at the instance of any party who can qualify a sufficient title and interest to raise a declarator. On the assumption that this view be sound I think that it would probably have been more appropriate not to repel the plea, but to allow a proof upon the alleged contract. This, however, is at best technical, as the proof on the question of jurisdiction would be the same as proof on the merits. The important question is whether in accordance with sound legal principle or decision a Scots Court can claim jurisdiction to declare that a domiciled South African is a married man and that he is bound to adhere to his wife.

For the defender it was maintained that as the decision involved a question of status the only court of competent jurisdiction is the court of his domicile, which is South Africa. This argument was based on the decision of the Privy Council in the well-known case of *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517. That case decided that the permanent domicile of the spouses within the territory is necessary to give to its courts jurisdiction to divorce *a vinculo*, so that the decree pronounced will have extra-territorial authority, and that a so-called "matrimonial domicile" created by residence within the territory, insufficient to fix their true domicile, cannot be recognised as creating such jurisdiction. Towards the end of his opinion Lord Watson quotes the following passage from Lord Penzance in *Wilson* v. *Wilson* ((1872) L.R., 2 P. & D. 435, at p. 442) —"Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." I do not, however, think that because the court of the permanent domicile of the spouses has exclusive jurisdiction in actions of divorce it necessarily follows that the same is the case where the question is as to the validity or invalidity of a contract of marriage. The status of married persons arises out of the contract, and it is well settled that the ceremony by which parties are married, including all the forms to be observed, depends upon the law of the country where the ceremony is performed. If parties have their domicile in the country where the contract is concluded, the *forum* of the obligation is also there, whether the law of the place where the contract is executed or the place where it is to be fulfilled is regarded as the determining factor.

In dealing with the *forum* of an obligation Savigny, Private International Law (Guthrie's 2nd ed., p. 194), says—"From this seat of the obligation, from this its home, shall we discover the particular jurisdiction as well as the local law by which it is to be judged." At p. 220 he adds—"The jurisdiction of the obligation can be made effective only if the debtor is *either* present in its territory or possesses property there." In Story's Conflict of Laws, 8th ed., p. 752, occurs this passage—"The civil law contemplated another place of jurisdiction, to wit, the place where a contract was made or was to be fulfilled, or where any other act was done, if the defendant or his property could be found there, although it was not the place of his domicil." At a later part of his work (at p. 754) when considering the subject of the foundation of jurisdiction the author says—"Considered in an international point of view, jurisdiction to be rightfully exercised must be founded either upon the person being within the territory, or upon the thing being within the territory, for otherwise there can be no sovereignty exerted. . . . No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."

There are several passages in Bar's International Law dealing with the question whether presence in the territory is essential to confer jurisdiction on the *forum contractus*. At p. 921 of Gillespie's edition the author says—"Older common law practice, in conformity with the law of Rome and with the Canon law, required as a condition of giving jurisdiction to the *forum contractus* that the action should be served upon the defender within the territory of the *forum contractus* or that the defender should possess property within that jurisdiction." He points out that in certain systems of jurisprudence this condition is not considered necessary, but he adds—"I believe, however, that it would be right in the interests of international jurisdiction to adhere to that special condition as essential to the *forum contractus*."

In *Schibsby* v. *Westenholz* ((1870) L.R., 6 Q.B. 155) the Queen's Bench in England had to consider the effect of a judgment pronounced by a French Court against defendants who were not resident or domiciled in France and had no notice of the pending

of the proceedings. According to the headnote in that case "A judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English Court where the defendant at the time the suit commenced was not a subject of nor resident in the country in which the judgment was obtained, for there existed nothing imposing on the defendant any duty to obey the judgment." Blackburn, J., who delivered the judgment of the Court in the course of his opinion said (at p. 161)—"If at the time when the obligation was contracted the defendants were within the foreign country but left it before the suit was instituted we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued."

In *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* ([1894] A.C. 670) the Privy Council had to consider the effect of a decree pronounced by a court against a defender who was not resident within the territory at the time when the action was raised. The appellant had been treasurer of the State of Faridkote, but at the date of the suit he had ceased to be such and was resident in the State of Jhind where he had his domicile. This suit was to recover money said to be owing to the respondent in connection with the appellant's employment as treasurer of Faridkote. A decree pronounced against the appellant in Faridkote after service upon him in the State of Jhind was sought to be enforced in the Courts of the Punjab. The Chief Court of that province held that the decree was valid and enforceable, but this decision was reversed by the Privy Council. In delivering the opinion of the Court the Earl of Selborne, after narrating the circumstances under which the action was brought, said (at p. 683)—"Under these circumstances there was in their Lordships' opinion nothing to take this case out of the general rule that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ('*Actor sequitur forum rei*'), which is rightly stated by Sir R. Phillimore (International Law, vol. iv, section 891) to 'lie at the root of all international and of most domestic jurisprudence on this matter.' All jurisdiction is properly territorial and *extra territorium jus dicenti, impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it and when they are living in another independent country." His Lordship then expressed disapproval of Blackburn, J.'s, indication of opinion quoted above as to a conventional jurisdiction in the *forum contractus* to determine a question on the contract after the defendant had left the territory and was not resident there even temporarily at the date of the institution of the suit. I do not think that the question of the validity of a contract of marriage so far as the question of jurisdiction is concerned is different from the question of the validity of any other contract. To give the Court of the country where a contract of marriage is alleged to have been contracted jurisdiction to pronounce an effective decree against a person not domiciled in the territory it is essential that the defender should be resident therein at the time the action is raised. It is this residence that gives the State a right to exact obedience and imposes upon the individual the duty of obedience to the decree pronounced.

The question now arises whether there is any decision pronounced by a Scots Court which necessitates our exercising jurisdiction and proceeding to pronounce a decree which, though it might not be entitled to extra-territorial consideration, would be binding within Scotland. Only two cases were referred to at the debate as supporting this contention, viz., *Dodds* v. *Westcomb* (M. 4793), in which a decree of declarator of marriage was pronounced against an Englishman whose domicile both at the date of the marriage and of the action was in England, and *Mackenzie* v. *Mackenzie*, 8th March 1810, F.C. In this latter case the defender had been domiciled in Scotland at the date of the alleged marriage, which was said to have been constituted by habit and repute. After living some years with the pursuer the defender deserted her and their children and went to reside in Manchester. A plea of no jurisdiction by the defender was rejected and decree of declarator was granted. The Lord Ordinary considers this decision as binding upon him.

Both these cases appear to have been before the Court in *Wylie* v. *Laye* (12 S. 927), which was decided by the Whole Court. In that case an action of declarator of marriage alleged to have been contracted in Scotland was brought against an Englishman who had not been cited personally within Scotland. The Court were of opinion that although the alleged marriage between the pursuer and defender was stated to have been contracted in Scotland, the *locus contractus* did not lay a foundation for a jurisdiction over a foreigner unless he had been cited in this country, or in some cases unless his funds had been arrested here *jurisdictionis fundandæ causa*. The latter ground of founding jurisdiction may be left out of account as it has been decided that jurisdiction cannot be constituted by the arrestment of funds belonging to a foreigner when the action on which the arrestment was used raised a question of status—*Morley* v. *Jackson*, (1888) 16 R. 78. The word "foreigner" seems to be used in the case of *Wylie* as meaning a person who at the date of the action has a domicile in a country other than Scotland. If this is the meaning of the opinion of the Whole Court I think that the decision is inconsistent with that reached either in the case of *Dodds* or *Mackenzie*, and that although these cases are not expressly overruled neither of them can now be regarded as authoritative.

In *Sinclair* v. *Sinclair* (22 D. 1475) jurisdiction in an action of damages for breach of promise of marriage was sustained against a defender domiciled in England at the time

when the action was raised, on the ground that the defender was personally cited when he was on a visit to Scotland. The importance of presence within the territory at the time of citation as necessary to found jurisdiction *ratione contractus* is clearly brought out in the opinion of the Lord Justice-Clerk, afterwards Lord President Inglis, at p. 1480. He says—"It is presence within the territory when the summons is served that is the important fact, combined with Scotch origin or Scotch contract, to found jurisdiction." After referring to the Roman law and citing passages from commentators thereon his Lordship proceeds:—"Among Scotch jurists Lord Kames states the principle most clearly—'To this rule that *actor sequitur forum rei* there are several exceptions, depending on circumstances, that entitle the claimant to cite his party to appear before the judge of a territory where the party hath not a residence. . . . A covenant bestows a jurisdiction on the judge of the territory where it is made, provided the party be found within the territory and be cited there. The reason is that if no other place for performance be specified, it is implied in the covenant that it shall be performed in the place where it is made, and it is natural to apply to the judge of that territory where the failure happens provided the party who fails be found there.'" His Lordship also said—"I am of opinion that according to the law of Scotland, adopting and applying principles of general jurisprudence, a party to a contract may be sued for a breach of contract *in loco contractus* if he be found within the country and duly convened in an action before a tribunal of that country."

The Lord Ordinary states that the decision in *Dodds'* case is referred to apparently with approval by Ersk. Inst. i, 2, 20. The approval is, however, of a very qualified character. The learned author says—"Civil jurisdiction is also founded *ratione contractus* if the defender had his domicile within the judge's territory at the time of entering into the contract sued upon, though he should not have his domicile there when the action was brought against him. But it is necessary in order to establish jurisdiction in this manner that the defender be actually within the judge's territory and be cited by a warrant issuing from his court, or at least that he have effects lying there, . . . for jurisdiction cannot have the least operation where both the person and the estate of the defender are withdrawn from the judge's power." He then mentions what he describes as the singular case of *Dodds*, and explains that the defender, who was called by edictal citation merely for the sake of form was not truly considered as a party, both the pursuer and her child having an obvious interest to get their legal state ascertained in that country to which they belonged originally and where they were constantly to reside. Lord Fraser (at p. 1273 of his work on Husband and Wife) disapproves this reasoning as erroneous, because the pursuer's status could not be declared without affecting that of the absent Englishman, over whom the Court had no jurisdiction.

For the pursuer a number of cases were relied upon in which an English or Scottish Court has sustained its jurisdiction to entertain an action of nullity of marriage contracted in Scotland or England where the defender was not domiciled in either of these countries at the date when the action was raised. I think the defender's counsel was right in saying that there is this distinction between such a suit and an action of declarator of marriage, that in the former case there is no admission as to the domicile of the two parties being the same, while in the latter there is. This distinction does not carry the matter very far, as there is no doubt that in both cases the status of the defender is affected, at all events within the territory of the Courts exercising jurisdiction, and it may be extra-territorially. There are not, however, many cases in which the question of jurisdiction has been discussed—the question for the most part has been whether the law of the place of the contract or the law of the domicile of parties at the date of the alleged marriage determines its validity. Great reliance cannot be placed upon decisions in undefended cases. The case of *Miller* v. *Deakin* (1912, 1 S.L.T, 253) came before me when I was in the Outer House. Such argument as was advanced upon the question of jurisdiction occurred in consequence of a doubt which I expressed as to whether I was entitled to grant the decree of nullity asked. No argument against jurisdiction was offered by the defender upon whom service had been made, and who, I understood, assented to my dealing with the case. In the course of my opinion I said that both parties desired the ceremony to be declared a nullity. After all, wherever an action relating to the contract of marriage is brought, it is by the *lex loci contractus* that its validity or invalidity ought to be determined, although presence of the defender within the territory of the *forum contractus* is necessary to make the decree of the Court binding upon the defender. I do not see why a defender who is not actually cited in Scotland should not allow the action to proceed as though he had been in the territory at the time when the action was raised, or why the Court should not proceed on being satisfied of such assent.

Certain English cases were founded on by the respondent. In *Simonin* v. *Mallac* (2 Sw. and Tr. 67) a Frenchman and a Frenchwoman came to England and celebrated a marriage without observing the formalities required by the law of their domicile. They returned to France. The marriage was not consummated, and the lady obtained a declarator of nullity in a French Court. Thereafter she went to reside in England, and alleged that she had acquired a domicile there. She then brought an action of declarator of nullity in that country, the defender being personally cited in Naples. The Court found, notwithstanding the declarator of nullity in France, that the marriage was binding in England on the ground that the marriage having been contracted in England, its validity, so far as questions of form were concerned, fell to be deter-

mined by the law of that country. Before dealing with the merits the Court had to consider the question whether it had jurisdiction to entertain the suit. The action was undefended, and in argument the circumstance was relied on that the defendant, although personal service had been made upon him, had not entered an appearance. In dealing with this part of the case Sir C. Cresswell, who delivered the opinion of the Court, said (at p. 74)—"The argument in favour of the jurisdiction was rested on the ground, first, that the contract was made in England, and that the Court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute, 4 Geo. IV, cap. 76, and that the tribunals *loci contractus* have, generally speaking, cognisance of the contract; secondly, that England is now the domicile of the petitioner, but that objection begs the main question in dispute, for if the marriage be valid it is not her domicile; thirdly, that the respondent was personally served with the citation and petition and has not appeared to contest the jurisdiction of this Court." He then added—"The 42nd section of the Statute 20 and 21 Vict. cap. 85, by which this Court was established, removes all objection on the ground of the citation having been served without Her Majesty's Dominions, but in our opinion this would not of itself suffice to give to the Court authority to decide upon the rights of a party not otherwise subject to its jurisdiction. This question therefore depends upon the first proposition, that the parties by professing to enter into a contract in England mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal." In Scotland, however, there is no provision like that in the English statute to which Sir C. Cresswell refers, and therefore this decision cannot be looked upon as indicative of what Scots law is.

The decision in *Simonin* has been followed in subsequent cases both on the point of jurisdiction and as to the validity of the marriage being determined by the *lex loci contractus*. Among such cases is *Sottomayor* v. *de Barros* ((1877) L.R., 2 P.D. 81, (1877) L.R., 3 P.D. 1, (1879) L.R. 5 P.D. 94), where the question raised was as to the validity of a marriage contracted in England by Portuguese first cousins, the law of Portugal making such relationship an absolute bar to the contract of marriage between persons so related. In this case no question of jurisdiction was discussed—the question was whether the law of the domicile or the law of the place where the marriage was celebrated determined the question as to the capacity of the parties to enter into the contract.

The circumstances giving rise to the case of *Ogden* v. *Ogden* ([1908] P. 46) are peculiar. An English lady went through a ceremony of marriage with a domiciled Frenchman, who afterwards got the marriage annulled in France on the ground that his father's consent, which was required by the law of France, had not been obtained. Subsequently he married a Frenchwoman in France. The Englishwoman then brought an action of divorce against her French husband on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction. Thereafter she went through a ceremony of marriage with an Englishman, describing herself as a widow. The man to whom she was so married brought a suit of nullity on the ground that the second marriage was bigamous. This petition was successful, the opinion of the Court, consisting of Cozens-Hardy, M.R., Sir Gorell Barnes, and Kennedy, L.J., being delivered by Sir Gorell Barnes, who went very fully into the preceding cases and the general law governing a contract of marriage. Towards the conclusion of his opinion that learned Judge says (at p. 82)—"With regard to the decision dismissing the appellant's suit for a divorce, it may be observed that her position after the French decree, and after Philip (the French husband) had left her and married again, would be intolerable unless some remedy in her favour existed, for by reason of the conflict of laws she would be a wife in England and not a wife in France, and in regard to such an observation it may not unreasonably be suggested that the remedy may be to allow her to obtain a divorce in England." He proceeds to suggest that the necessities of the case would call for the intervention of the courts of her own country in order to do her justice and to release her from a tie recognised in the one country though not in the other. This suggestion of Lord Gorell was given practical effect to in the cases of *Stathatos* v. *Stathatos*, [1913] P. 46) and *De Montaigu*, [1913] P. 184. This class of case introduces an exception to the general rule laid down in *Le Mesurier* ([1895] A.C. 517) that divorce can only be obtained in the court of the domicile, the exception being justified on the ground that the court of the domicile has refused the wife the remedy to which she is entitled, and that the decree affords her practical redress from a position that otherwise would be intolerable.

The Lord Ordinary seems to hold that a similar situation of hardship has arisen in the present case. He says—"I think this Court must necessarily have the power to declare the existence of his (*i.e.*, the defender's) marriage, contracted as it was at a date when his domicile was in Scotland. No other court, in my opinion, could competently do so." This does not appear to me to be a correct statement of the law. It may be that in another country the appropriate form of action to try the question whether the parties are married would be different, but there is nothing to prevent it being done. In the very important case of *Dalrymple* v. *Dalrymple* ((1811), 2 Hagg. Const. 54), in an action brought by a lady whose domicile of origin was Scottish against a gentleman domiciled in England for restitution of conjugal rights, Lord Stowell found that a binding marriage according to Scots law had been contracted in Scotland between the parties. At p. 58

his Lordship says—"Miss Gordon, who had before her some reports of no very definite nature, instantly, upon hearing authentic news of this event (defender's marriage in England to another lady), takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid to enforce the performance of what she considers as a marriage contract." Later on the same same page he says—"Being entertained in an English Court it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they have their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland."

It is not suggested that the pursuer cannot get an effective decree in a South African Court, where presumably the law as stated by Lord Stowell would be administered. According to the pursuer's own averments she has resided many years in South Africa, a country which she has only recently left, and where, if her averments are well founded, she is still domiciled. The effective remedy which she wants against the defender is adherence or aliment, and this she can only obtain in South Africa. She certainly has a right of action in that country. She may also have a right of action in this country as the *forum contractus*, but to give the Scots Court jurisdiction against the defender, who is a domiciled South African, he must have been resident in Scotland at the time when he was cited. I am of opinion that the Lord Ordinary's interlocutor should be recalled, the first plea for the defender sustained, and the action dismissed.

LORD ANDERSON—This reclaiming note raises a question of interest and importance. The Lord Ordinary has decided that he has jurisdiction to try an action of declarator of marriage the defender in which is domiciled in South Africa. It is common ground that the defender has no estate, heritable or moveable, in this country and that he has not been personally cited in Scotland. As jurisdiction, speaking generally, is founded on the presence in the territory either of property or of the person against whom a decree is sought (Ersk. i, 2, 16) the interlocutor reclaimed against would seem, *prima facie* at least, to be unsound. The defender maintains that it is contrary to the settled law of this country.

The Lord Ordinary bases his judgment on these three considerations—(1) that the *locus contractus* was Scotland; (2) that the defender is a native of Scotland; and (3) that at the date of the alleged marriage he was domiciled in this country. The defender's counsel took exception to each of these circumstances as a basis of jurisdiction.

As to the first it was pointed out that the contract was disputed and that the Court could not determine whether or not it had jurisdiction without deciding the merits of the cause. It was thus impossible to decide *primo loco* as should be done whether there was jurisdiction. If on inquiry as to the merits the Court found for the pursuer, then *ipso facto* it determined that jurisdiction existed—if for the defender, then the Court has assumed a jurisdiction which it had no right to exercise. This argument is subtle but not sound. If it were sound it would have formed the *ratio decidendi* in cases of this kind to which reference falls to be made — in particular, this ground of judgment could hardly have escaped the notice of those who were engaged in the Whole Court case of *Wylie* v. *Laye*, 12 S. 927. It is plain, therefore, that *locus contractus* means the place of the alleged contract, that is, of the contract averred in the pursuer's pleadings.

As to the second ground on which the Lord Ordinary proceeded, we were informed that no admission had been made as to the defender's domicile of origin. Assuming, however, that he was born in Scotland, I am unable to hold that this is helpful to the pursuer. I do not leave out of view that Lord President Strathclyde laid stress on this circumstance in the case of *Corporation of Glasgow* v. *Johnston* (1915 S.C. 555), but his views were not shared by the other members of the Court, and I have no hesitation in holding that nativity is not a material element in a question of jurisdiction.

As to the third ground of judgment, I am at a loss to see what bearing on the question of what is the jurisdiction *now* the domicile of the defender at a former period of time can have. The facts on which jurisdiction depends must be facts at the date of citation, and the important question, so far as domicile is concerned is, where is it at that point of time and not where was it twenty years ago.

The defender's counsel submitted two alternative contentions—(1) If the action is considered as raising a question of status, the only Court having jurisdiction is that of the defender's present domicile, to wit, South Africa. This argument was based on the case of *Le Mesurier*, [1895] A.C. 517. I am not prepared to hold that *Le Mesurier* decided anything more than it purported to determine, to wit, "that the permanent domicile of the spouses within the territory is necessary to give its Courts jurisdiction so to divorce *a vinculo* as that its decree to that effect shall by the general law of nations possess extra-territorial authority." I have therefore no hesitation in negativing this first contention of the defender.

(2) it was maintained alternatively for the defender that if the action is considered as raising a question of contract, there may be jurisdiction in the courts of this country concurrent with that of the courts of the defender's present domicile. Jurisdiction in Scotland only exists, however, it was urged, if these prerequisites of its exercise co-exist—(1) that the *locus contractus* is in Scotland, and (2) that the defender was personally cited in Scotland. It is to be noted that the conclusion of the summons

is purely declaratory, involving a question of status, and therefore arrestment of moveables *ad fundandam jurisdictionem* is ineffective—Fraser, Husband and Wife, ii, 1276; Graham Stewart on Diligence, p. 250; *Morley*, 16 R. 78.

Before considering whether or not this alternative contention of the defender is well founded, these four general observations might be made — 1. The question to be decided is not what the law of Scotland ought to be but what it is? It was strongly urged that personal service in the territory had now no efficacy but was a valueless formality. The rule had survived, it was said, any virtue it might originally have possessed. The reason for the rule is probably to be found in that procedure of former remote times whereby a defender was seized in the territory and detained until the *lis* had been decided. Nowadays it was said, he might leave Scotland the day after citation. The same sort of criticism might be levelled at any other basis of jurisdiction. Residence in this country might be terminated the day after citation; in the absence of arrestment in security, heritable property might be sold, or moveable property arrested, to found jurisdiction removed from the territory. If the rule does in point of fact exist in our law, it seems immaterial, so far as our duty to declare the law is concerned, that no cogent reason for its existence can now be adduced. Should it be thought inexpedient to maintain the rule, this inexpediency can only be declared by the House of Lords or by an Act of Parliament if it be the case that the rule has been affirmed by the Whole Court in *Wylie*. 2. Considerations of convenience are irrelevant if there are not concurrent jurisdictions, for it is only then that the plea of *forum non conveniens* may be urged and considered. It is undoubtedly a hardship to the pursuer to follow the defender to South Africa, but the principles of private international law compel her to do so if she cannot properly convene him here. This hardship must always be endured by pursuers who are compelled to observe the most general rule as to jurisdiction—*actor sequitur forum rei*. If the Courts of South Africa alone have jurisdiction, the pursuer must sue her remedy there. The South African Court will then have the duty (1) of ascertaining the facts, it may be by inquiry before a commissioner in Scotland, and (2) of ascertaining and applying the law of Scotland as to irregular marriages to those facts. This is familiar procedure. When I sat in the Outer House I decided consistorial causes in which the whole evidence had been taken on commission in distant lands. 3. If the jurisdiction claimed in this country is an exception to the general rule I have alluded to — *actor sequitur forum rei*—then this exceptional jurisdiction must be exercised in strict accordance with its settled conditions. Lord Fraser, indeed (Husband and Wife, 2nd ed., ii, 1273 and 1274), regards the rule not as an exception to the law *actor sequitur forum rei*, but as a general rule itself which "had an existence in the codes of civilised nations as the first ground of jurisdiction." If this be so, it is the more imperative that all the conditions of the rule be strictly observed. 4. Both parties gave a full citation of English authority in illustration of the procedure followed in English Courts in reference to actions of this nature. In my opinion English practice affords no guide as to what is the procedure in this country. If our procedure is settled, and if it is in accordance with the practice of other countries whose systems, like ours, are based on the Roman law, it seems immaterial that the procedure of the English Courts follows different rules. For these reasons I consider myself absolved from referring to any of the English cases which were cited. What then is the law of Scotland on the matter in dispute? It is common ground that jurisdiction is not founded *ratione loci contractus* alone; there must be something more. According to the defender's contention the other essential (arrestment *ad fundandam jurisdictionem* being inapplicable) is personal service on the defender in Scotland. The material circumstance is not the citation of the defender but his presence in the territory at the moment of citation. The execution of personal service at that time is evidence of his presence then and there. This execution notifies that at the commencement of the *lis* he was within the territory and so amenable to the jurisdiction. That this is the law of Scotland appears from an examination (1) of the decided cases, (2) of the institutional writers, and (3) of authoritative modern text-books.

1. *Cases*—Seven decisions fall to be considered as bearing directly on the matter in dispute. (1) *Dodds* v. *Westcomb*, (1745) M. 4793. In this case the irregular marriage was said to have been contracted in Scotland between a Scotswoman and a domiciled Englishman then resident in Scotland. The pursuer sued for declarator of marriage and decree of adherence and aliment. When the action was raised the defender was resident in England, and there had been no personal service on him in Scotland. He maintained that the Scottish Court had no jurisdiction over him. The defence was repelled and decree pronounced. Erskine describes this decision as "a singular case" (Inst. i, 2, 20) and it was impliedly overruled in the Whole Court case of *Wylie* v. *Laye*. (2) *Scruton* v. *Gray*, (1772) M. 4822. In this action of declarator of marriage, adherence, and aliment at the instance of a Scotswoman against an Irishman in respect of an irregular marriage said to have been contracted in Scotland, the defender pleaded "no jurisdiction." Moveables in Scotland belonging to him had been arrested to found jurisdiction. The Court held (1) that it was "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"; (2) that arrestment used *ad fundandam jurisdictionem* did not apply, as the conclusion was not founded on a document of debt but was concerned with a question of status. The case of

Dodds v. *Westcomb* was referred to but not followed. (3) *Key* v. *Burnet*, 1780, referred to in Fraser, Husband and Wife, ii, p. 1272, note (*a*), and contained in the Arniston Collection, Session Papers, Advocates' Library, vol. 130, No. 8. The pursuer, a Scotswoman, brought an action of declarator of marriage against a domiciled Englishman in respect of an irregular marriage said to have been contracted in Scotland. The defender was personally cited in Scotland. It was conceded that the *locus contractus* by itself did not found jurisdiction, but it was maintained "that if the contracting party (though he came from the remotest corner of the earth) be *found* in the *locus contractus*, the party with whom he has contracted is entitled to lay hold of him there, to bring him before the courts of that country and there compel him to perform the contract." The jurisdiction was sustained, and from a manuscript note on Lord Cullen's session papers in the Signet Library it appears that "on the jurisdiction they (the Court) were clear, and entirely on his having been *personally cited*." (4) *Forrest* v. *Funstone*, (1789) M. 4823. The pursuer, an Irishwoman, brought an action of declarator of marriage against a domiciled Irishman, in respect of a marriage said to have taken place in Ireland. The only ground for holding that the defender was subject to the jurisdiction of the Scottish Courts consisted in this, that at the time of citation the defender, who was a soldier, was possessed of a furnished apartment in Blackness Castle in Scotland. There was no personal citation of the defender in Scotland, and as has been pointed out, the *locus contractus* was Ireland. The Court held that there was no jurisdiction. (5) *Mackenzie* v. *Mackenzie*, 8th March 1810, F.C. This is the case on which the Lord Ordinary's decision is based. The pursuer along with her two children by the defender brought an action of declarator of marriage and legitimacy, in which there was also a conclusion for aliment. The pursuer and defender were natives of this country, and it was alleged that a marriage, habit and repute, had been constituted by residence in Scotland. The defender pleaded that as he had settled in England *animo remanendi* the Scottish Courts had no jurisdiction. This plea was repelled on the ground that where two natural-born subjects had contracted a marriage in this country the husband was amenable to its jurisdiction in a declarator of marriage although he had gone to reside in England. Regarding this case these observations may be made—(*a*) it offends against the rule whereby jurisdiction is determined by the state of the facts at the date of citation; (*b*) it is adverse to the decisions in *Scruton* and *Key*; (*c*) it is contrary to the opinion of Erskine, where it is specifically laid down that it is not enough that the defender had his domicile within the territory when the contract was entered into; (*d*) it was considered in the case of *Wylie*, and in my opinion impliedly reversed by that decision. (6) The Whole Court case of *Wylie* affirms the rule on which the decisions in *Scruton* and *Key* were pronounced, and this rule, so affirmed, has regulated our practice since the year 1834, when *Wylie* was decided. The defender was an Englishman and there was no personal citation in this country but only edictal citation. The alleged marriage took place in Scotland and the pursuer was a Scotswoman. The summons concluded for declarator of marriage and there was also a conclusion for aliment. The defender pleaded no jurisdiction and this plea was sustained. The cases of *Dodds* and *Mackenzie* were before the Court, and they seem to me to be overruled by its decision. The judgment of the Court is quite general, and no exception to the rule laid down is hinted at. That rule obviously applies both to contracts involving a question of status and ordinary mercantile contracts in which jurisdiction can be founded by arrestment *ad fundandam jurisdictionem*. The defender here is a "foreigner" in the sense of the judgment in *Wylie*, which lays down plainly and unambiguously that in an action involving status there is jurisdiction only if these essential requisites concur—(1st) *locus contractus*, (2nd) personal citation in the territory. It was suggested that this latter condition was only essential when the declaratory conclusion was accompanied by a petitory one for aliment. *Wylie* gives no support to this contention, nor was any other authority cited in its favour. In my opinion there is no substance in this suggestion. (7) The last case to be noted is that of *Sinclair* v. *Smith*, 22 D. 1475. The pursuer and defender were natives of Scotland, but the defender at the date of raising the action was domiciled in England. The action was for damages for breach of contract of marriage, it being alleged that the promise to marry was made in Scotland. The defender was cited personally in Scotland and the Court held that it had jurisdiction. Lord Justice-Clerk Inglis at p. 1481 makes these general observations, which seem to me to be applicable to all contracts, both those involving status and those which are purely mercantile—"Nothing, I think, is better settled as a rule of general jurisprudence than that the tribunals of a country where a contract was made or is to be performed have jurisdiction to enforce it, provided the party called as defender to the action or proceeding is for the time, however temporarily, within that country. It is true that the law of France seems to reject this foundation of jurisdiction for reasons of policy, into the soundness of which it is unnecessary to inquire; and it is also true that the doctrine is unknown to the law of England, because the personal presence of a party within the country is according to that system of jurisprudence of itself sufficient to give jurisdiction to the English Courts. But the rule of the Roman law (L. 19, *de judiciis*), which seems to make the locality of the contract in all cases a sufficient foundation of jurisdiction, has been adopted by the other nations of Europe, who generally follow the Roman law, with this qualification, that the party to be sued on the contract must be found at

the time within the judge's territory where the contract was made and is to be enforced. Huber speaks on this point with his accustomed precision — '*Contractus, ita forum tribuit, si contrahens in eodem loco reperiatur*' (2 Prælect. 730, sec. 54), distinguishing between the temporary or casual presence of the party in the territory which combined with *locus contractus* founds jurisdiction, and that residence which is called domicile for purposes of civil jurisdiction, which he describes thus, '*Ubi reus habitat*' (sec. 50, p. 729)."

2. *Institutional Writers.*—Ersk. i, 2, 20, says — "Civil jurisdiction is also founded *ratione contractus* if the defender had his domicile within the judge's territory at the time of entering into the contract sued upon, though he should not have his domicile there when the action is brought against him. But it is necessary in order to establish jurisdiction in this manner that the defender be actually within the judge's territory, and be cited by a warrant issuing from his court, or at least that he have effects lying there (L, 19 pr., sec. 1, 2, *de judic.*), for jurisdiction cannot have the least operation when both the person and the estate of the defender are withdrawn from the judge's power." Lord Kames (Law Tracts: Courts, p. 252) thus deals with the matter—"To this rule that *actor sequitur forum rei* there are several exceptions, depending on circumstances, that entitle the claimant to cite his party to appear before the judge of a territory where the party hath not a residence . . . a covenant bestows a jurisdiction on the judge of the territory where it is made, provided the party be found within the territory and be cited there. The reason is that if no other place for performance be specified it is implied in the covenant that it shall be performed in the place where it is made, and it is natural to apply to the judge of that territory where the failure happens, provided the party who fails be found there." Lord Fraser (Husband and Wife, ii, 1271-1275) states the law to the same effect, and points out that although in actions of declarator of marriage domicile is the main basis of jurisdiction, there is also jurisdiction in respect of *locus contractus* coupled with personal citation on the ground that "it is reasonable that where one of the parties seeks to have the contract declared an action should be competent in the Scottish Courts against the other contractor found personally within their jurisdiction" at p. 1272.

3. *Modern text books* may be referred to for the purpose of showing that in the opinion of the authors the law still is what *Wylie* v. *Laye* declared it to be. In Mackay's Manual of Practice it is said (at p. 55) that "declarator of marriage alleged to be contracted in Scotland would also be sustained against a foreigner if cited in Scotland." The learned author adds—"In cases under this head (that is, *locus contractus*) personal citation in Scotland is indispensable." Similar statements as to the present state of the law are to be found in Maclaren's Court of Session Practice, p. 60, and Duncan and Dykes' Principles of Civil Jurisdiction, p. 50, where it is said "the defender must always be personally present in the territory when he is cited"—see also pp. 186-190.

If the law is conclusively settled in the sense contended for by the defender, it is futile and unnecessary to examine suggested analogies, such as declarators of nullity of marriage, with the object of determining what the law ought to be. I therefore do not propose to deal with the rival contentions of counsel as to these alleged analogies.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled and the plea of "no jurisdiction" sustained.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defender, and dismissed the action.

Counsel for the Pursuer and Respondent —Solicitor-General (Fleming, K.C.)—W. H. Stevenson. Agents — Mitchell & Baxter, W.S.

Counsel for the Defender and Reclaimer —Mitchell, K.C.—J. C. Watson. Agents— Warden, Weir, & Macgregor, S.S.C.

Saturday, March 17.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* CHARLESWORTH, PEEBLES, & COMPANY AND OTHERS.

Patent—Infringement—Damages—Measure of Damages where Patent Infringed is not itself the Subject of a Licence—Royalty Method—Applicability.

In actions for damages for the infringement of patents relating to electric lamps, *held* (1) that a royalty payable on the price of lamps sold under a licence granted by the pursuers in combination with other patentees for the manufacture and sale of lamps embodying one or more of a group of patents, could not be accepted as a measure of the damages arising from the infringement of a patent connected with the manufacture of the lamps which, although it was not expressly included in the licences granted by the pursuers, the licencees were allowed to use, but (2) that the sales effected by the infringers were on too extensive a scale to allow of an assessment of nominal damages only, and damages assessed accordingly. *Held further*, that damages for the infringement of a patent of a special nature included in the licences granted by the pursuers could be assessed on the royalty method.

Observations (*per* the Lord President and Lord Skerrington) on the application of the royalty method to the assessment of damages for infringement of patents.