

No 1.

one of the creditors had been born in Scotland, though he had resided all his life in England. The Lords repelled the objection, chiefly upon the *ratio* that the ground of debt had its rise in Scotland.

Answered for the defender; That it would be unreasonable to sustain a *forum ratione originis*: Suppose a person to be carried out of the country wherein he was born, while an infant, Why should the circumstance of his having been born in that country subject him to the judicatories of it, when he can no more be supposed acquainted with the laws and customs of it, than of any other country in Europe? He likewise opposed the decision, Heir of Colonel Brogs *contra* —, No 28. p. 4816., where the Lords refused process against a defender residing in Holland, *animo remanendi*, to account for intromissions had by him in Holland, although he was a native of Scotland, and that the pursuer declared that he insisted in the action, only that he might have execution against such of the defender's goods as he had within Scotland.

The point appearing not to be clearly settled in our practice, the Ordinary stated the question verbally to the Lords; when the opinion of the Court was, that the Ordinary should sustain the *forum ratione originis*; and the *ratio decidendi* was, that in this case the ground of action had its rise in Scotland.

For the Lords were pretty much agreed, that had the ground of action been a fact committed, or contract entered into out of Scotland, it would not have been enough to subject the defender to the jurisdiction of this Court, that he had been born in Scotland.

(*Fol. Dic. v. 3. p. 237. Kilkerran, (FORUM COMPETENS.) No 3. p. 214.*)

1760. June 27.

ROBERT HOG Merchant in Campvere, *against* SMART TENNENT, Merchant in Campvere.

No 2.

The jurisdiction of the Court of Session over the natives of Scotland residing at Campvere, *ratione originis*, not excluded by that of the Conservator.

ROBERT HOG, a member of the Scots factory at Campvere, and who had for many years resided there, brought an action against Smart Tennant, another member of that factory, concluding, *imo*, For payment of the balance of an account current between them; *2do*, For the contents of a bill drawn by a merchant in Leith upon Tennent, payable to Hog; and, *3tio*, For damages in respect of Tennent's having injured Hog in his trade, by defaming his character, and having insulted and beat him.

The defender *objected* to the jurisdiction of the Court of Session to try this cause, at least in the first instance, in respect of both parties being residents in Campvere, and subject to the jurisdiction of the conservator-court there; which he alleged was privative of the jurisdiction of the Court of Session.

Pleaded for the defender; By the 81st act of King James IV. Parl. 6. the Conservator's jurisdiction was established over the Scots merchants at the staple port; and the act appears to have been made soon after the staple contract was entered into between the Royal Burghs and the Magistrates of Campvere; which shows, that it must have been specially intended for the benefit of the members.

of the new established factory at that port, in order to prevent them from being put to the trouble and expense of coming over to Scotland to get justice. The Conservator's jurisdiction is confirmed and enlarged by many subsequent statutes; and the meaning of the words in the original act, 'That no merchant shall pursue another before any other judge beyond the sea, but the conservator,' appears to have been, that 'no merchants beyond the sea should resort to any other judge at home,' as the act expressly gives the conservator a jurisdiction over such merchants, in questions with each other; and without that construction, it could not give the benefit to those merchants which was evidently intended. *2do*, Sir James Balfour, Sir George M'Kenzie, Sir James Stewart, and our other lawyers, put this construction upon the constitution of the conservator-court, that its jurisdiction was sole and exclusive over the merchants subject to it; nor could the Scots Legislature have in view merely the excluding that of the foreign judges, over whom it had no power. *3tio*, By the 4th article of the staple contract, the jurisdiction of the Dutch Judges is expressly excluded, and that of the Conservator further confirmed, by providing, 'That every question or difference, civil or criminal, happening between two of the Scots nation, shall be *only* pleaded, adjudged, and, by definitive sentence, determined by the Court of the Conservator,' &c. *4to*, The long and continued acquiescence of the merchants residing at this port, in the Conservator's jurisdiction, tends greatly to strengthen it; as no example can be given of any process having been brought by them, against any of their own number, in this Court, in the first instance. And, *5to*, In 1749 the Conservator having given judgment in a process between Coutts and Company and Ramsay, *voce* JURISDICTION, a bill of advocation thereof was refused as incompetent; and the Lord Ordinary's interlocutor adhered to on a reclaiming petition. In that case it seemed to be admitted on all hands, that no question arising betwixt the merchants at Campvere could, in the first instance, be brought before any other court than the Conservator's; and if the contrary should be now found, his jurisdiction will be in effect entirely abolished.

Answered for the pursuer; Jurisdiction, at first view, seems to be naturally territorial, or confined to persons and things locally within a territory subject to the dominion of the state by which the jurisdiction is delegated. This notion, however, but ill agrees with the nature and exigencies of government. It has therefore been justly considered, that laws ought to have more respect to persons, as members of society, than as inhabitants of a particular spot of ground. Every man born under a state or government becomes a member of the body-politic, and is entitled to privileges as such. It is reasonable, on the other hand, he should subject himself to the laws of that society in which he is first received. Now, as he cannot be deprived of his native privileges, without a regular forfeiture, neither can he throw off his natural subjection, without a special immunity. On this principle our lawyers have agreed, that a subsisting *forum competens* is established *ratione originis*. Neither our laws nor our supreme

No 2. judicatures are considered as strictly territorial, but extend to natives wherever they go; and change of residence cannot afford an exemption from them. Hence acts of attainder, and outlawries, are passed against subjects abroad *animo remanendi*; and daily proceedings are had in this Court against such, upon citations at the market-cross of Edinburgh, pier and shore of Leith. Decrees in those cases may require the aid of foreign judges in their execution, while neither the debtors nor their effects are here; but where the person sued appears in court, (as in this case,) he must show a legal exemption, otherwise the process must go on against him. Now, the defender has instructed no exemption in this case; for, *1mo*, The words of King James IV.'s act demonstrate, that no more was thereby intended than to prohibit the Scots merchants abroad from suing each other before foreign judges, when they could have their disputes determined by the Conservator, or the courts of their native country. 'Before any other judge beyond the sea,' can never be understood to exclude the judges at home, or on this side of the sea. And although the Scots Legislature had no power over foreign judges, yet it had power over Scots subjects, and could impose penalties on them if they neglected its injunctions. And with this view, by the 96th act, 6th Parl. James VI. erecting the Scots factory in the Netherlands into an incorporation, the members thereof were obliged to take an oath of obedience to the King and his laws. The Conservator-court being entirely a Scots Court, its jurisdiction can at most be only considered as cumulative with that of the Supreme Courts in this country, whence it derived its origin; and the defender's argument, if it proves any thing, proves too much; as it would oblige the Scots merchants, in all other parts of the world, to bring their actions before the Conservator at Campvere. *2do*, Balfour, and our other lawyers, carry the matter no farther than is universally admitted, namely, that the Conservator is a judge competent in questions between merchants within his bounds; but none of them say, that his jurisdiction is exclusive of the Court of Session. *3tio*, The staple contract makes for the pursuer, not against him; the sole view thereof being to exclude the Dutch judges, and Dutch laws, from affecting the factory concerns. The parties to that contract had no power, had they been inclined, to have carried the matter farther; though, according to the defender's doctrine, the power of the Conservator would be absolute and uncontrollable; which could never be *expedient*, even for the factory at Campvere; as it is an evident advantage for them to have their causes tried in the Supreme Court here, or in the last resort, if they incline, rather than to lie at the mercy of a particular officer, who may possibly be not deeply skilled in law. *4to*, Many cases may have occurred, parallel to the present, which may have escaped notice, by the jurisdiction not being declined; and, at any rate, the public rights and privileges of a subject cannot be lost *non utendo*. And, *5to*, As to the decision in the case of Coutts and Ramsay, it seems to have been given without mature consideration; and it does not apply to this case, as there the parties had sisted themselves before the Conservator, and received

his judgment. So that the question was, Whether this Court could review his decree? whereas here the case is brought originally before this Court.

The Court considered this case chiefly on the ground of the *forum ratione originis*; which was held to be sufficient to establish a jurisdiction in this Court over natives abroad. And it was observed, that it was so found in the competition of Captain Wilson's Creditors, No 27. p. 2778.

The erection of the Conservator-court at Campvere was not thought to give any exemption from the Supreme Court of this country; but rather on the contrary, that the establishment of a Scots factory there strengthened the original jurisdiction of this Court over the Scotsmen composing that factory; and the propriety of the decision in the case of Coutts, as to the Conservator's judgments not being subject to review here, was much doubted of.

'THE LORDS repelled the declinature to the jurisdiction of this Court; and sustained the action.'

Reporter, *Auchinleck*. For the Pursuer, *D. Rae*. Alt. *Sir Jo. Stuart*. Clerk, *Home*.
Fol. Dic. v. 3. p. 238. Fac. Col. No 225. p. 415.

* * * Lord Kames reports the same case :

By the act 81, Parliament 1503, jurisdiction is bestowed upon the Conservator to determine differences betwixt merchant and merchant beyond seas, who must assume six of the most knowing merchants to judge with him, at least four if more cannot be had. And our merchants abroad are discharged to bring their suits before any other judge beyond sea under a penalty. In the 1697 was the staple contract made betwixt the convention of Royal Burghs and the Magistrates of Campvere, which was ratified by their respective Sovereigns. By the fourth article of this contract, it is provided, 'That the Lord Conservator, in all cases civil or criminal, shall exercise jurisdiction over the persons and goods of those who belong to the Scots staple, and who reside within the town of Campvere or freedom thereof.' Then follows a clause by which the judges of the town of Campvere are expressly barred from judging in any question, civil or criminal, between those of the Scotch nation, declaring that in all such questions the court of the Conservator shall have an exclusive jurisdiction without appeal.

Robert Hog, a Scotch merchant in Campvere, having brought a process before the Court of Session against Smart Tennent, another Scotch merchant there, for payment of the balance of an account; the defender insisted in a declinator of the Court of Session, *pleading* that by the act of Parliament and staple-contract above mentioned, the Conservator's jurisdiction was made exclusive of the courts in this country as well as foreign courts. And in support of this declinator, a judgment was urged, given in the 1749, betwixt Coutts and Ramsay, *voce* JURISDICTION, where a bill of advocation from the Conservator's court was unanimously refused as incompetent.

No 2.

Answered, That the statute and contract referred to have no other view than to exclude foreign Courts; and there is not a word in either of them that can import an exclusion of the Court of Session. The Conservator's court, it is true, is exclusive of the courts of this country with respect to matters criminal, not by the authority of the statute or contract, but by the constitution of the Court of Justiciary, which has no jurisdiction in crimes perpetrated abroad. But with respect to all civil matters betwixt Scotchmen, wherever transacted, the Court of Session has a jurisdiction; and the party against whom the process is brought, if out of the kingdom, can be summoned at the market-cross of Edinburgh, pier and shore of Leith. So far indeed it is true, that the Court of Session, though a supreme Court, has no authority over the Conservator's court, because it has no authority over any foreign court; and, therefore, a bill of advocacy from the Conservator's Court was justly refused. For the same reason, the decrees of our judges in the colonies cannot be reviewed by any ordinary court in Britain. The appeal must be to the King and council; to which Court an appeal will also lie of any decree pronounced by the Conservator. But this concludes nothing against an original process brought before the Court of Session.

'THE LORDS repelled the declinator.' See JURISDICTION.

Sel. Dec. No. 164. p. 226.

1789. February 9.

DAME ELISABETH BRUNSDONE *against* SIR THOMAS WALLACE, Baronet.

No 3.

A marriage celebrated in England between two natives of Scotland residing in England *animo re-manendi* not dissoluble in the Scottish Courts.

SIR THOMAS WALLACE, a native of Scotland, left this country when thirty years old, without any intention of returning.

Having gone to England, he made his addresses to Mrs Elisabeth Brunstone. She also was a native of Scotland, but had for many years resided in England.

They were married in London according to the rites of the English church. Soon after, they went to France, from whence the Lady returned to England, and then commenced, in the Commissary-court of Edinburgh, a process of divorce on the head of adultery. The criminal acts were said to have been committed in France.

Sir Thomas Wallace, as being out of Scotland, having been cited at the market-cross of Edinburgh, and at the pier and shore of Leith, the Commissaries proceeded in the usual way to allow a proof. But a bill of advocacy to the Court of Session was preferred, in which it was

Pleaded; Jurisdiction and the power of putting the sentence of the judge in execution, are counterparts of each other; without the latter, the former would be nugatory and absurd. In order to constitute a *forum*, therefore, either the party called as defender, or, where the question is purely of a pecuniary nature, some part of his effects must be subject to the orders of the Court. Thus the Judges in Scotland cannot regularly exercise any judicial authority