the note and motion and minute, and the pursuer to amend the record as proposed in his answers and minute, and the amendments having been made, of new closed the record; allowed the proof to be opened up in order that the defender might lead additional evidence on the averments contained in his note and motion and minute; allowed the pursuer a proof in replication, and appointed the proof to be taken by Lord Salvesen on a date to be afterwards fixed.

Counsel for the Pursuer and Respondent—MacRobert—D. M. Wilson. Agents—Fyfe, Ireland, & Dangerfield, W.S.

Counsel for the Defender and Appellant—D.-F. Dickson, K.C.—Macphail, K.C.—Burnet. Agent—James Scott, S.S.C.

Saturday, February 27.

FIRST DIVISION.

[Lord Dewar, Ordinary.

GLASGOW CORPORATION *v.* JOHNSTON.

Jurisdiction—Domicile—Delict—Scotsman Absent from Country at Date of Raising of Action, with no Fixed Residence, Edictally Cited in Action Based on his Delict.

An action of relief from the compensation payable to an injured workman was brought against a defender in respect of delict committed in Scotland. The defender was by birth and origin a domiciled Scotsman and had never lost that domicile nor acquired another; but some years before the alleged delict he had left his usual residence, and about a month before the raising of the action had left Scotland and had not returned, nor had he acquired a fixed residence anywhere. He used his former Scotch address as his address for letters, which were forwarded to him, and for the purpose of registration of his motor car. He was cited edictally and by registered letter at the said address. *Held* that, in the circumstances, the Court had jurisdiction to try the action.

Observed per Lord Dundas—"I do not think that it . . . would be advisable to lay down as an absolute or general rule that Scots domicile combined with *locus delicti* in Scotland will in all cases lead to a similar result."

The Corporation of the City of Glasgow, *pursuers*, brought an action of relief against Harold Bruce Johnston of The Pass, Callander, then furth of Scotland, *defender*, calling upon him to indemnify them for the payment of compensation at the rate of 15s. per week from the 14th day of February 1913 until the further orders of the Court, and expenses amounting to £20, 5s. 9d., "being the principal and expenses contained in the award of Sheriff-Substitute A. S. D. Thomson at Glasgow, dated the 3rd day of November 1913, and interlocutor following thereon of the 24th day of November 1913, in the proceedings in the Sheriff Court at Glasgow at the instance of Duncan Mitchell, carter, 14 Robert Street, Govan, against the said pursuers for payment of compensation under the Workmen's Compensation Act 1906."

The defender pleaded, *inter alia*—"No jurisdiction."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 17th November 1914 repelled this plea.

Opinion.—"In this action the Corporation of the City of Glasgow claim relief against the defender Harold Bruce Johnston for certain sums for which they have been found liable to one of their servants in name of compensation under the Workmen's Compensation Act.

"The pursuers aver on record that on 7th February 1913 while their said servant in the course of his employment was driving a horse and cart along Paisley Road, Glasgow, he was run into and injured by a motor car which the defender was driving. They plead that as the said injuries were caused by the fault and negligence of the defender, he is under liability to pay damages in respect thereof, and that the pursuers having been found liable to the said servant for compensation and the expenses of the action, are entitled under the provisions of the Workmen's Compensation Act 1906 to be indemnified by the defender.

"In addition to a defence on the merits the defender pleads that the Scotch Courts have no jurisdiction. Proof on this preliminary plea was allowed, and I have now heard the evidence. The material facts proved are as follows:—The defender, who is thirty-two years of age, is a domiciled Scotsman, and at the time of the accident [February 7, 1913] resided in Glasgow. He is a son of the late Henry Buist Johnston, stockbroker, Glasgow, who died in 1907. The late Mr Johnston was proprietor of, and resided at, The Pass, Callander, and the defender and his mother continued to reside there until 1910, when the place was let to a yearly tenant. From 1910 till May 1913 the defender was employed in Glasgow and resided there. He then went to London. He returned to Scotland in September, and remained in a hotel at Callander till November. This action was raised in December—the summons being signeted on 6th December 1913—but by that time the defender was on his way to Canada. He remained in Canada till January 1914, when he returned to London. He again visited Canada and came back to London in June 1914. He is there still. Since he left Scotland he has lived in various hotels and boarding houses, but had never any fixed residence. He used The Pass, Callander, as his permanent address. His letters are sent there and forwarded by the Callander postmaster. He gave this address for the registration of his motor car. He is entered on the valuation roll as joint owner and occupier. He explains in evidence that this was a mistake, but he admits that he has exercised the franchise in respect of it. He is in receipt of an income of £80 a-year from his

father's estate, which is administered in Scotland. He is one of the trustees under his father's trust-disposition and settlement. By that deed the testator left his widow the liferent use and occupancy of The Pass, with furnishings and fittings, and an annuity of £80 to the defender. The widow enjoys the liferent use of the residue of the estate, amounting to about £12,500, and on her death it falls to be paid over to the defender in the event of his surviving his mother. If he should predecease her without leaving issue the residue goes to her. The defender and his mother, who is also a trustee, manage the trust estate. The whole income goes to the mother, and she arranges with her son as to his annuity. The defender states on record that he has no claim for any part of this annuity in respect that there are trust funds in his hands in excess of any sum due to him. It appears from the trust accounts that he has at the present time about £500 of trust money in his hands not yet invested in name of the trustees.

"In these circumstances the defender argued that there was no jurisdiction in respect that he had neither residence nor property in Scotland, that he was not present in Scotland for forty days prior to the date of citation, and that the summons was not personally served upon him.

"The pursuers replied—(1) That the defender had real estate in Scotland; they argued that under his father's trust-disposition and settlement the fee of The Pass, Callander, had vested in the defender, and that he was accordingly subject to the jurisdiction of the Scotch Courts; and (2) and in any event that the defender having committed a delict in Scotland, and having been validly cited, the Court had jurisdiction *ratione delicti.*

"In the view I take of the case I do not require to consider whether the fee of The Pass has vested in the defender, because I am of opinion that the second branch of the pursuers' argument is well founded.

"There can, I think, be no doubt that the commission within Scotland of a delict or quasi-delict, out of which an obligation of reparation arises, founds jurisdiction in the Scotch Courts upon an action laid upon the delict if the defender be well cited. It is not necessary that the defender should in such a case have resided continuously in one locality within Scotland for forty days. Such residence founds jurisdiction *ratione domicilii.* But jurisdiction founded upon delict does not depend upon the length of time the defender may have resided within the territory. However brief his period of residence may have been, he is subject to the jurisdiction of the Court within whose territory the delict was committed if he is validly cited—if, for example, the summons has been personally served upon him (*Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984, 8 S.L.R. 628). The question therefore is whether the defender in this case has been validly cited. The summons was not personally served upon him, but I do not think that was necessary in the circumstances. He is not a foreigner, but a domiciled Scotsman, who was in constant residence in Scotland at the time of the delict, and only left the country a few weeks before the action was raised, and has no business or permanent residence elsewhere. He does not pretend that the case could be more conveniently tried in any other Court. It is true that residence and not domicile is what determines jurisdiction in ordinary cases; still domicile is important in judging of the character of the residence (*Buchan* v. *Grimaldi*, July 6, 1905, 7 F. 907, 42 S.L.R. 706). The defender had not actually occupied The Pass for a considerable time, but he apparently regarded it, and certainly treated it in various ways, as his usual place of residence, and left it without giving notice where he was to be found. Now by the 53rd section of the Judicature Act 1825 it is provided that where a person 'shall have left his usual place of residence, and have been therefrom absent during the space of forty days, without notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms prescribed accordingly.' The defender was cited in terms of this provision, and I think that was sufficient. I am accordingly of opinion that the first plea-in-law for the defender must be repelled."

The defender reclaimed, and argued—To found jurisdiction it was necessary to have in addition to a delict committed in the country either personal citation or the presence of the defender in the country at the date of citation. The commission of a delict in the country plus valid citation was not sufficient. The defender had lost his Scottish domicile, and even if he had not that fact was not relevant to the question of jurisdiction. On that question the Court would merely consider forensic domicile, *i.e.*, forty days' residence in the country previous to the citation—*Orr Ewing's Trustees* v. *Orr Ewing*, &c., July 24, 1885, 13 R. (H.L.) 1, Lord Halsbury, L.C., at 5, 22 S.L.R. 911; *Joel* v. *Gill*, June 10, 1859, 21 D. 929, Lord Justice-Clerk Inglis at 938; *Tasker* v. *Grieve*, November 2, 1905, 8 F. 45, Lord Kyllachy at 51, Lord Justice-Clerk Macdonald at 51, 43 S.L.R. 42; *Buchan* v. *Grimaldi*, July 6, 1905, 7 F. 917, Lord Kyllachy at 921, 42 S.L.R. 706; *Sinclair* v. *Smith*, July 17, 1860, 22 D. 1475, Lord Justice-Clerk Inglis at 1480; *Barbers of Edinburgh* v. *Wilson & Blair*, 1743, M. 4793; *Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984, Lord President Inglis at 985, 8 S.L.R. 628; *Johnston* v. *Strachan*, &c., March 19, 1861, 23 D. 758, Lord Justice-Clerk Inglis at 769; *Parnell* v. *Walter*, February 5, 1889, 16 R. 917, Lord Kinnear at 923, 27 S.L.R. 1; *Longworth* v. *Hope*, &c., July 1, 1865, 3 Macph. 1049, Lord Curriehill at 1055; *Sirdar Gurdyal Sing* v. *Rajah of Faridkote*, [1894] A.C. 670; *Bald* v. *Dawson*, 1911, 2 S.L.T. 459; Mackay's Manual of Practice, p. 55; Erskine's Institutes, bk. i, tit. ii, secs. 16-20. The Court of Session Act 1825 (6 Geo. IV, cap. 120), sec. 53, had nothing to do with jurisdiction, but merely regulated citation—*Johnston* v. *Strachan*, &c. (*cit. sup.*), Lord Kinloch at 762. The argument in *Anderson* v. *Hodgson & Ormiston*, 1747, M. 4779, was based on

domicilium originis merely and the case had never been followed, but had been overruled by *Grant* v. *Pedie*, July 5, 1825, 1 W. & S. 716. *Grant* v. *Pedie* (*cit. sup.*) had been subsequently followed on contract by *Pirie & Sons* v. *Warden*, February 20, 1867, 5 Macph. 497, 3 S.L.R. 260; on delict by *Kermick* v. *Watson* (*cit. sup.*); and on questions of status by *Wylie* v. *Laye*, July 11, 1834, 12 S. 927—Mackay's Manual of Practice, p. 53. The same rule held good in the Sheriff Court—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 6 (*a*) (*i*). The proper form of citation for persons furth of Scotland was to be found in the Court of Session Act 1825, secs. 51, 53; the Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), sec. 3; and C.A.S., c. i, 6. A man might well have lost his Scotch domicile even if he left a postal address there—*Brown* v. *Blaikie*, February 1, 1849, 11 D. 474.

Argued for the pursuers (respondents)—The cases cited for the reclaimer nowhere stated that the presence of the defender in the country was necessary in circumstances like the present. The only case in which the facts covered the present case, *i.e.*, *Anderson* v. *Hodgson & Ormiston* (*cit. sup.*) was in favour of the pursuers, and was by implication accepted in *Johnston* v. *Strachan, &c.* (*cit. sup.*), Lord Justice-Clerk Inglis at 767. *Grant* v. *Pedie* (*cit. sup.*) proceeded solely on the question of jurisdiction *ratione originis*. The case of a native Scotsman was different from that of a foreigner, since his usual place of abode was presumed to be Scotland—*Corstorphine* v. *Kasten*, December 13, 1898, 1 F. 287, Lord President Robertson at 293, 36 S.L.R. 174; *Buchan* v. *Grimaldi* (*cit. sup.*), Lord Stormonth-Darling at 923. The need for personal citation was superseded by written citation. The address left by the defender in Scotland was equivalent to an undertaking to answer for delict when cited there—*International Exhibition* 1890 v. *Bapty*, May 26, 1891, 18 R. 843, Lord Young at 846, 28 S.L.R. 648; Motor Car Registration and Licensing Order, November 20, 1903, Part I, Arts. 3, 4, 13; Bar's Private International Law, p. 921. The requisites for founding jurisdiction were different in contract and in delict, since in the former jurisdiction arose by agreement and in the latter was coercive, *e.g.*, preventative jurisdiction. In delict the only requisite was citation of any kind effectual within the territory, or citation of any kind whatever coupled with the presence of the defender within the territory—*Waygood & Company* v. *Bennie*, February 17, 1885, 12 R. 651, Lord M'Laren at 654, 22 S.L.R. 413; Savigny's Private International Law (2nd ed.), pp. 198, 209, 217, 220. In England the Court might authorise citation outwith its jurisdiction—Foote's Private International Jurisprudence (4th ed.), 325. Law on the subject was still in a fluid condition—Dove Wilson's Sheriff Court Practice (4th ed.), 72. The need for personal citation only arose when the defender had no dwelling at which citation could be made—*Sinclair* v. *Smith* (*cit. sup.*), Lord Justice-Clerk at 1480; *Johnston* v. *Strachan, &c.* (*cit. sup.*), Lord Justice-Clerk Inglis at 767, 769; *Toni Tyres, Limited* v. *Palmer Tyre, Limited*, January 31, 1905, 7 F. 477, Lord Low at 483, 42 S.L.R. 352. The only case for the defender in which the *locus delicti* was founded on was *Kermick* v. *Watson* (*cit. sup.*). It was clear that the defender had not displaced his domicile of origin, and accordingly if not properly cited at his address he was properly cited edictally. [Lord Mackenzie referred to Campbell's Law of Citations, chap. i; *Wylie* v. *Lange*, July 11, 1834, 12 S. 927; *Brown* v. *Blaikie*, February 1, 1849, 11 D. 474.]

At advising—

Lord President — The sole question before us here is whether the defender is amenable to the jurisdiction of this Court. I am of opinion that he is, on the ground that he is a native of Scotland duly convened to answer in the Supreme Court of his own country to a claim for delict or quasi-delict committed by him in Scotland. The action has, I think, rightly been treated on both sides of the bar as one for damages in which the claim against the defender rests upon an alleged wrong done by him in Scotland. He is alleged to have run down and seriously injured a man in a road near Glasgow by negligently driving his motor car. He is a native of Scotland. His permanent residence was in Scotland until within thirty days of the raising of this action. At the date when the action was raised he had no residence and no place of business elsewhere. He was a domiciled Scotsman. There was no forum to whose jurisdiction he was amenable at the date when this action was raised save the Supreme Court of his own country. If the maxim *actor sequitur forum rei* is applicable, then it is certain that there is no other court in this world before which the defender could have been summoned, and which would have had jurisdiction over him at the date when this action was raised.

In these circumstances there is authority for holding, even although the ground of action had not arisen in Scotland, that this Court would have had jurisdiction over the defender. That is the ground upon which your Lordships are prepared to sustain jurisdiction, and I concur in it. I find that in the well-known and valuable note by Lord Ivory to Erskine (i, 2, 19, Nicolson's edition, note, p. 40), amongst the illustrations which he gives of the elements which coupled with nativity will found jurisdiction, he sets out—"3. Likewise, if the Scotsman has never been properly domiciled elsewhere, but has been always moving about, or perhaps has only been carried abroad by his public duties — as, for instance, a soldier with his regiment." That seems to me to be applicable to the present case, but on the whole I prefer to found my opinion upon the linked elements of nativity and *locus delicti*. This appears to me to be supported by direct authority.

The case of *Anderson* v. *Hodgson and Ormiston*, 1747, M. 4779, appears to me to be directly in point. That was an action of damages raised by a shopkeeper in Kelso against two men who were resident in Newcastle for an alleged wrong committed by them against him in Scotland. Both were

resident in England. Neither had a residence, a place of business, or effects in Scotland, but it appeared that one of them, Ormiston, was a Scotsman by birth, although he had for many years resided in England, and on that ground it was contended that jurisdiction existed against him. His answer was that it would be unreasonable to sustain a *forum ratione originis*, but "the point appearing not to be clearly settled in our practice," the report bears, "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 was born in Scotland." Now I assume, first, that there was no personal service in that case, and, second, that the nativity of the defender Ormiston was a material element in the view of the Court. I think I am entitled to make both assumptions, because I find that the case is reported at a subsequent stage under the heading *Reparation—Anderson* v. *Ormiston and Lorain*, 1750, M. 13,949, and it there appears that the pursuer came next, after having exhausted his remedy against the Sheriff-Depute, "to insist against Hodgson and Ormiston, and they having declined the jurisdiction as not being subject to the courts of this country, declinator was sustained for Hodgson, but Ormiston being a native of Scotland, the declinator was, as to him, repelled." From this I infer that if there had been personal service, Hodgson the Englishman would not have been liberated, and if nativity had been considered of no account, then Ormiston the Scotsman would have been liberated. In other words, if there had been personal service, Hodgson would have shared the fate of Ormiston, and if nativity had been considered of no account, Ormiston would have shared the fate of Hodgson.

Now the authority of the case of *Anderson*, (1750) M. 13,949, has never been questioned. It is cited in all the text-books and in subsequent decisions on this branch of the law. And it is expressly approved by Lord Benholme in the case of *Sinclair* v. *Smith*, 22 D. 1475, at p. 1485. He says—"I find in the case of *Anderson*, reported by Kilkerran, a remarkable distinction taken between the case where nativity alone is pleaded as a ground of jurisdiction, and the case in which it is pleaded in combination with other elements. In *Anderson's* case his Lordship states that the opinion of the Court was that the Lord 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. There the circumstance of nativity was taken in combination with that of the place of the contract. But he distinguishes between that combination, which was there held to be a sufficient ground of jurisdiction, and that single element which was in the House of Lords, in the case of *Grant*, 1 W. & S. 716, held insufficient *per se* to found jurisdiction. He says—'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.' That is the very doctrine announced by the Lord Chancellor in *Grant* v. *Pedie*." And it is worthy of note that Lord Benholme, in the case to which I have just referred, *Sinclair* v. *Smith*, says—"In reference to the present case, it appears to me that the element of nativity might be taken in combination with one of two other elements, either with the place of the contract or with the personal citation of the defender; and as at present advised I think that in either combination there might be enough to found jurisdiction. I find decisions in the books supporting that view." It is to be observed that in Lord Ivory's Note to Erskine, to which I have already referred, the case of *Anderson* v. *Hodgson* is cited as an authority for this proposition, that if, in addition to being the place of the nativity of the defender, Scotland is also the *locus contractus*, the place where the ground of action originated, jurisdiction will be sustained. There is no word there of personal service, and I think there was none in the case of *Anderson*.

The passage I have just read from Lord Benholme's opinion appears to me to dispose effectually of the contention which has been more than once urged before this Court, and was urged in the argument to which we listened, that nativity is not an element to be taken into account at all in the question of jurisdiction, and that the authority therefore of *Anderson's* case is completely upset. The meaning and effect of the judgment of the House of Lords in the case of *Grant* v. *Pedie* was thoroughly canvassed in this Division of the Court in the case of *Ritchie* v. *Fraser*, (1852) 15 D. 205, and is nowhere stated with greater precision and brevity than in the opinion of Lord Fullerton which will be presently quoted by my brother Lord Dundas. But Lord Fullerton does not stand alone, for I find that the Lord President (M'Neill) in *Ritchie* v. *Fraser* says distinctly—"The case of *Pedie* v. *Grant* merely fixes that the domicile or origin will not do by itself without an effectual citation." And Lord Cuninghame says—"The case of *Grant* v. *Pedie* in the House of Lords in 1821 has sometimes been founded on as abrogating in all cases the *forum originis* in questions of jurisdiction. . . . In that instance a claimant in Scotland cited edictally a defender resident in London who was a native of Scotland, but who had not been in this country for many years. The pursuer took this step even when it was alleged that the accounts between the parties formed the subject of a pending suit in Chancery. In that very special case the Court of Review reversed the decision of the Court of Session, sustaining the edicta citation, and held that there was no juris-

diction in general over an absent native *ratione originis* without personal citation, but remitted the case back to the Court of Session to inquire how far the defender was not amenable *ratione contractus*." And I observe that Lord Ivory, than whom there is no higher authority in this department of law, says—"The case of *Pedie* v. *Grant* is not applicable. I concur in the explanation of that case given by your Lordship." And it will be found that in the case of *Sinclair* v. *Smith*, to which I have already referred, the Lord Justice-Clerk (Inglis) takes exactly the same view of *Pedie* v. *Grant* that was taken by the Judges of the First Division in the case of *Ritchie* v. *Fraser*.

In that state of the authorities it appears to me to be well settled that the combination of the two elements of nativity and *locus delicti* or *locus contractus* are sufficient to found jurisdiction against a native of Scotland in the courts of his own country to which he has been properly convened. No doubt in the subsequent case of *Johnston* v. *Strachan*, 23 D. 758, the Lord Justice-Clerk (Inglis) treats the question as open, and says at p. 767—"(1) On the combination of the two facts that the defender's domicile of origin was in Scotland and that the place of the contract sued on was Scotland, or (2) on the combination of the two facts that the domicile of origin was in Scotland and that the false representations, which are the ground of action, were made in Scotland," the question is open. But he sums up his views upon this topic in the penultimate paragraph of his opinion, where, at page 770, he says—"The Court must not be understood as expressing or indicating any opinion how far jurisdiction may be sustained against a person not within the territory and domiciled beyond the territory" (an element absent here) "on the ground that he was a Scotchman by origin and that the cause of action arose in Scotland, for no such question is raised by the facts of the present case." I cannot help thinking that if that eminent Judge had thought the combination of these two elements, on which my judgment rests, was insufficient to found jurisdiction he would have said so, and would have given reasons for differing from the judgment in the case of *Anderson* v. *Hodgson*, which up to that date had been regarded as an unquestionable authority for the proposition.

[*His Lordship here dealt with points with which this report is not concerned.*]

For the reasons which I have given, which are not precisely the same as those given by the Lord Ordinary, I am for adhering to the interlocutor reclaimed against.

LORD DUNDAS — Upon this question of jurisdiction I agree with the conclusion at which the Lord Ordinary has arrived.

The action, though in form one of relief, is in substance an action for damages in respect of the defender's alleged delict or quasi-delict in running down a man in the streets of Glasgow. He was at the date of this occurrence (7th February 1913) a domiciled Scotsman by birth and origin; and I think it clear upon the evidence, though the contrary was maintained in argument, that he has never lost that domicile or acquired any other. The defender was then resident in Glasgow, but he left Scotland in May 1913, and has never since, with one brief and unimportant exception, been in this country. He was cited edictally in terms of the Judicature Act, and also—*ob majorem cautelam* perhaps, but (as I think) inappropriately — by registered letter addressed to "The Pass, Callander," where he had resided up to 1910, and which he subsequently gave as the address of his "usual residence" in connection with the registration of his motor car. We have therefore here the case of a Scotsman who has never lost his domicile of origin, who is charged with the commission of a delict in Scotland, but who has not been personally cited in Scotland. The question whether or not he is in these circumstances subject to our jurisdiction is not, I think, covered by any previous decision.

I do not doubt that the domicile of origin is, notwithstanding the case of *Pedie* v. *Grant*, (1825) 1 W. & S. 716, an element which may be of importance in determining such a question. I think the Scots jurisdiction would be sustained against a Scotsman who retained his domicile of origin, and who had been personally cited in Scotland. In *Ritchie*, (1852) 15 D., at p. 208, Lord Fullerton said — "The case of *Pedie* decides nothing but this, that where a native Scotsman was resident abroad and had never come back, the mere circumstances of his birth in Scotland is not enough to warrant edictal citation." I may also refer to Lord Cuninghame's opinion in the same case, and to that of Lord Justice-Clerk Inglis in *Sinclair*, (1860) 22 D. 1475, at p. 1480. There is no doubt an *obiter dictum* to a contrary effect by Lord Kyllachy in *Tasker*, (1905) 8 F. 45, but in the case before him the defender had acquired a foreign domicile.

It is, I think, further established that our jurisdiction will be sustained even as against a foreigner if the *locus contractus* or *locus delicti* was in Scotland and the defender has been personally cited in this country—*Sinclair*. Whether or not the result should be the same where, as here, the defender is a domiciled Scot, and the *locus delicti* was in Scotland, but there has not been personal citation here, has not yet been decided. In *Sinclair's* case, 22 D., at p. 1485, Lord Benholme stated a tentative opinion in the affirmative. In *Johnston*, (1861) 23 D., at p. 770, Lord Justice-Clerk Inglis reserved his opinion as to "how far jurisdiction may be sustained against a person not within the territory, and domiciled beyond the territory, on the ground that he was a Scotchman by origin, and that the cause of action arose in Scotland." In *M'Arthur*, (1842) 4 D., at p. 361, Lord Fullerton thought that "in a question of mere pecuniary obligation the circumstances of the place of birth and *locus contractus* combined cannot have any stronger effect than when existing separately." The

opinion was, however, *obiter;* the defender there had acquired a foreign domicile, and the case was one of contract, not delict.

The pursuers' counsel argued that the question as between personal citation on the one hand, and edictal or other citation on the other, was here immaterial and irrelevant, looking to the fact that the defender has appeared and lodged defences. I think the pursuers put their argument too high. It is true that when a defender appears in Court it is no longer open to him to take objection to irregularities in the form of his citation; but I cannot hold that by appearing to object to the jurisdiction of the Court he is foreclosed from arguing that jurisdiction is excluded in respect that the citation was not personal, and that in the absence of such citation within the territory domicile of origin and *locus delicti* are insufficient grounds for sustaining jurisdiction. The defender is a domiciled Scot, and was at the time of the alleged delict (February 1913) resident here. He has now it seems no fixed or permanent residence anywhere, and I do not know what *forum* is suggested as the proper and convenient one in which he can be called to answer to the pursuers' charge. In the circumstances of the case, which are somewhat special, I am of opinion that we have and ought to exercise jurisdiction. I do not, however, think that it is necessary or would be advisable to lay down as an absolute or general rule that Scots domicile combined with *locus delicti* in Scotland will in all cases lead to a similar result.

[*His Lordship here dealt with points with which this report is not concerned.*]

LORD MACKENZIE—The facts of this case make it a special one. The *locus delicti* was in Scotland, for I regard the action as in form only one of relief. The defender's domicile of origin is Scots, and the evidence plainly shows he has never lost his Scots domicile. His plea of no jurisdiction is founded upon the maxim *actor sequitur forum rei.* But when his account of himself is examined it is apparent that to give effect to that doctrine would be a denial of justice, for there is no form to which the pursuers could have recourse other than the courts of this country. In the circumstances, therefore, of this case I am of opinion there is sufficient to warrant us in sustaining the jurisdiction of this Court. There is no case which prevents our coming to that conclusion. The point seems to have been reserved by the Lord Justice-Clerk (Inglis) in *Johnston* v. *Strachan,* 23 D. 758. The case is entirely different from one in which a defender whose domicile of origin is in Scotland is resident, *e.g.*, in London, in which case it might be that the pursuer should follow him there even though the *locus contractus* or *locus delicti* was in Scotland.

I wish, however, to say that I cannot take the view that "valid citation," to which the Lord Ordinary refers, has anything to do with the matter. Citation is the calling of a defender to appear in Court, but the antecedent to "valid citation" is that the Court has jurisdiction to issue the summons. If it has not, the defender may appear and maintain that there is no jurisdiction. His appearance, though it bars him from objecting to the technical conclusions of the citation, puts no obstacle in the way of his arguing that there is no jurisdiction.

There are, no doubt, passages in the text writers, and in the cases which have been cited and examined with reference to the present case, in which the element of personal citation has been considered essential. It has been decided that there is jurisdiction in the court of the *locus contractus* or *locus delicti* when there has been personal citation. The underlying principle, however, is deeper than due observance of the requisites of citation. It is because the defender is personally present within the territory of the Judge—"Contractus forum tribuit, si contractus in eodem loco referiatur." As in the case of contract, so in the case of delict. In remitting the case of *Pedie* v. *Grant,* 1 W. & S. 716, the Lord Chancellor said he found in books of more or less authority treating upon the law of Scotland that not only the contract should be made in Scotland, but that the defender should be found there. This is not merely a matter of citation. In the present case it was admitted that the proper mode of citation was edictal. This could not affect the question of whether the Court has jurisdiction. In the course of the argument some observations were made upon the preventive jurisdiction of the Court. Upon this I will only say that, in my opinion, dicta on the subject of jurisdiction of that character are not necessarily to be applied to cases of delict. [*His Lordship here dealt with points with which this report is not concerned.*]

In the present case I agree that the defender's first plea-in-law should be repelled.

LORD JOHNSTON and LORD SKERRINGTON were absent from the hearing.

The Court affirmed the interlocutor of the Lord Ordinary and repelled the plea for the defender of no jurisdiction.

Counsel for the Pursuers (Respondents)—Constable, K.C.—Lippe. Agents—Simpson & Marwick, W.S.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—Aitchison. Agents—Balfour & Manson, S.S.C.

Thursday, March 11.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

WALKER *v.* NISBET.

Process — Proving the Tenor — Incidental Proof of Tenor—Sheriff Court Process —Casus amissionis.

In an action in the Sheriff Court to recover the contents of a promissory-note alleged to have been lost while in the custody of a co-obligant, objections to the competency of questions as to