

No 60.

clear; for, though a merchant should go out of the country, and stay several months and die, he changes not his domicil, not being there *animo remanendi*; and his testament is not to be confirmed in Edinburgh, *ut in communi patria*, as those who die as Scotsmen residing out of the country, as the Lords found Douglas *contra* Johnston, No 59. p. 4846., which though it was stopped by a bill was never recalled; and though, as to citation and *competentia fori*, forty days residence in Edinburgh may be sufficient, yet it cannot as to the quot and confirmation.

THE LORDS preferred the Commissary of Brechin.

*Stair, v. 2. p. 67.*

\* \* Dirleton also reports the same case:

THERE being a competition betwixt the Commissaries of Edinburgh and the Commissaries of Brechin, to which of them the confirmation of the Earl of Panmuir's testament should belong; the said Earl having taken a house and staid a whole session in Edinburgh, with his lady, children, and family, in order to the breeding of his children and other occasions; and having died there,

THE LORDS preferred the Commissaries of Brechin, being Commissaries of the place where the said Earl had his principal dwelling, and his interest and estate.

*Dirleton, No 159. p. 64.*

1684. February.

COMMISSARIES of Edinburgh *against* The COMMISSARY of St Andrew's.

No 61.

Although a person die abroad, if he did not reside there, *animo remanendi* his executry must be confirmed in the district where he had chiefly resided.

IN a competition betwixt the Commissaries of Edinburgh and St Andrew's, for the power of confirming the testament of a Scots skipper, who had gone upon a voyage to Holland, where he died before his return;

*Alleged* for the Commissary of St Andrew's; That the benefit of the confirmation belonged to him, in respect the defunct's wife and family lived in St Andrew's.

*Answered* for the Commissaries of Edinburgh; That Edinburgh was *communis patria*, and the skipper being 40 days abroad, is presumed to have fixed his domicil in Holland.

*Replied*; By the act 88, Parl. 6th, James I, the testament of Scotsmen dying before their return from abroad, whither they had gone *sine animo remanendi*, are to be confirmed before their ordinaries; for though goods in Scotland belonging to strangers and foreigners, are to be confirmed by the Commissaries of Edinburgh, as *communis patria*, whether the owners died there or elsewhere; yet it is otherwise with Scots subjects, who go abroad *sine animo remanendi*; and the skipper's family in Scotland took off all presumption of a design to set up in Holland.

THE LORDS preferred the Commissary of St Andrew's.

*Fol. Dic. v. 1. p. 331. Harcarse, (EXECUTRY.) No 459. p. 125.*