dittay of usury, for taking the Martinmas interest of fifty merks upon the 18th of July, in the case of Purdie, anno 1666; and the like, November 28, 1668, in the case of Hugh Roxburgh; as appears from the books of adjournal.

DUPLIED for the charger,—The two cases urged from the books of adjournal do not meet; for there annual-rent due at Martinmas was exacted in the preceding July, which could not receive a favourable construction, or be imputed to the creditor's mistake: whereas, to infer usury from such a minute escape *in calculo* as the charger's is, might pave the way for catching the most exact and honestest men.

The Lords found the charger not guilty of usury, and that there was only error *in calculo*.

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1707. *Feb.* 20. JOHN CALLENDER of Craigforth, *against* the Laird of Lundin.

JOHN CALLENDER having pursued the Earl of Melfort to pay a debt, which he referred to his oath; for taking whereof a commission was granted to the English consul at Genoa, where the Earl resided at the time, to be reported the first day of July, 1695; the Earl was forfeited on the second day of the said month of July, and in February thereafter, John Callender obtained the term to be circumduced, for not reporting the commission.

The Lords found, That the decreet of circumduction in February, 1696, holding the late Earl of Melfort as confest after he had been forfeited, cannot constitute a debt to prejudge the Laird of Lundin, donator to the forfeiture. Because a circumduction after the forfeiture could no more infer a debt against the king or his donator, than the rebel's confession, or giving bond could do.

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1707. *March* 13. JOHN IRVINE of Kincaussie, *against* ALEXANDER DEUCHARS, Writer in Edinburgh.

IN the competition of the creditors of Streichan, John Irvine of Kincausssie, having arrested in the Earl of Murray's hands, at his dwelling-houe of Dunnibirsle, July 12, 1706; and Alexander Deuchars, writer in Edinburgh, having arrested on the 20th of the said month, in the Earl's hands personally, at his house of Tarnaway: Mr. Deuchars claimed to be preferred, because his arrestment, though posterior to Kincaussie's, was executed at the Earl's principal dwelling-house of Tarnaway, where the bulk of his estate lies, and seasin by his charters is expressly ordained to be taken, and where he was residing at the time: whereas Kincaussie's arrestment was executed only at Dunnibirsle, a private seat for a summer retirement, that is ordinarily allocated to the ladies of that family for a jointure house;

and where the Earl did not reside at the time, but only had a servant or two, to take care of the house, and oversee the building of some park-dikes. And if forty days residence in Edinburgh subjects a stranger to compear before the courts there, much more must the Earl of Murray's dwelling with his family in the heart of a liberal fortune at Tarnaway, the whole summer season, constitute his domicile there.

ANSWERED, for Irvine of Kincaussie,—Albeit the Earl's staying forty days at Tarnaway might constitute a cumulative domicile to the effect of citation or arrestment, yet that is consistent with Dunnibirsle's remaining his chief domicile, though it were not his principal messuage. Thus, a charge of horning at a man's dwelling-house in Galloway, where he retained *focum et larem*, was sustained, though he had resided forty days at Edinburgh;—11th February, 1674, M'Culloch *contra* Gordon: and forty days stay in a hired house, at Edinburgh was not found to constitute a domicile, as to denunciation and escheat, or confirmation of a testament, (though it would have been sufficient to sustain citation,) but the principal domicile was to be considered; November 20, 1672, Paterson *contra* Fermour; February 7, 1672, Commissaries of Edinburgh and Brechin *contra* Earl of Panmure. And if it were otherwise, legal diligence would be at a dangerous uncertainty, and in hazard of being overturned by probation of a temporary change, which is not to be presumed, *Voet. Comment. ad Pandect. L. 5. Tit.* 1. *N.* 99. *et* 92. *L.* 5. *L.* 6. § 2. *L.* 27. § 2. *L. pen. ff. de Senatoribus.* Now, suppose an arrestment at Tarnaway be good, an arrestment at Dunnibirsle may be good also: and the question is not, which was the Earl's principal house, but which of his houses was his ordinary dwelling, to the effect of sustaining a legal diligence. Now, Tarnaway is not the Earl's ordinary place of residence; his father not having been there for eighteen years before his death, and himself only twice since then. Again, Tarnaway is not the only place of infefting the Earl in his estate, for his latest charters contain three places for taking infeftment at, viz. Tarnaway for his lands in Murray, the castle of Down for his lands in Down, and Dunnibirsle for his lands in Fife. Nor is his domicile determined by the place of taking infeftment, but by his ordinary residence; which none can know better than the Earl himself, who has declared under his hand,—That Dunnibirsle is his ordinary residence and principal domicile; and his going to Murray in April last, was not *animo remanendi*, but to do his affairs with his chamberlains, &c. with a resolution to return home, which he did in September thereafter; and that during his absence he left at Dunnibirsle his best set of coach-horses, grooms, housekeepers, and other servants, who acquainted him of what passed there, and particularly of Kincaussie's arrestment.

REPLIED for Mr. Deuchars,—The cited decisions do not meet the case: For they relate to persons necessarily from home, and forty days at Edinburgh about their private affairs: and the *animus perpetuo remanendi* can never appear or be demonstrated otherwise than from the deed of the proprieter, shewing his inclination to alter his residence by withdrawing himself and his family from one place to another, and living there a considerable time. Nor can the Earl's declaration alter the nature of things.

The Lords sustained Kincaussie's arrestment, and preferred him.

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