

1707. *March* 13. IRVINE of Kincoussie *against* DEUCHAR of Comrie.

IRVINE of Kincoussie, and Alexander Deuchar of Comrie, writer in Edinburgh, being both creditors to Fraser of Strichen, they arrest in the hands of the Earl of Murray, as debtor to Strichen. Kincoussie's arrestment is executed at the Earl's house of Dinnibirsle, on the 12th of July 1706; Mr Deuchar's is on the 20th of that month to the Earl, personally apprehended at his house of Tarnoway in the north; Kincoussie craved preference on his arrestment, as being eight days prior to the other, and the rule is *prior tempore est potior in jure*. *Objected* by Mr Deuchar, That Kincoussie's was null, being neither personally, nor at his dwelling-house; whereas his arrestment had both; and the execution at Dinnibirsle could not be regarded, not being then the Earl's domicile, he having removed in the April before with his lady and family to Tarnoway, where his greatest interest lies; and having left only some servants at Dinnibirsle to look after the house and planting; so he must be construed to have his *focum et larem*, where he principally staid; seeing 40 days residence in Edinburgh before the citation is sufficient to found a jurisdiction, *et forum ibi sortiri ratione domicilii*. *Answered* for Kincoussie, That Dinnibirsle is known to be the Earl's ordinary and fixed residence, and his retiring for a while in the summer to the north for his diversion, or to count with his chamberlains, cannot alter his domicile, he not going there *animo remanendi*; and the Earl, by a declaration under his hand, asserts his principal domicile was at Dinnibirsle, and his coach and horses and chief furniture were all left at Dinnibirsle; and although Tarnoway were a cumulative domicile with respect to citations or arrestments, yet that can never hinder, but a prior arrestment given at Dinnibirsle is preferable. And thus, on the 11th of February 1674, McCulloch *contra* Gordon, No 29. p. 3701. a charge of horning at a man's dwelling-house in Galloway was sustained, though he had been absent from it more than 40 days in Edinburgh; and so, in No p. 61. 3724., and 7th February 1672, Commissaries of Edinburgh and Brechin *contra* the Earl of Panmuir, (*voce* FORUM COMPETENS.) competing for the confirmation of the last Earl's testament, the LORDS preferred Brechin, because there was his principal residence, though he died in Edinburgh. And *Voet. ad lib. 5. dig. tit. de judiciis*, decides, That *domicilii mutatio non facile præsumenda, nisi probetur, et duobus locis potest quis habere domicilium*. —THE LORDS found both the arrestments were legal and formal; and as an execution at Tarnoway was good, so that at Dinnibirsle (though not actually there at the time), was as good; and therefore, Kincoussie's arrestment at Dinnibirsle, being eight days prior to Mr Deuchar's, they preferred it to the other. See FORUM COMPETENS.

Fol. Dic. v. 1. p. 259. Fountainhall, v. 2. p. 358.

No 31.

An execution of arrestment, on 12th July, against a party at his principal dwelling-house, which he had left in April before, to pass the summer in another house, was preferred to a posterior execution against him personally apprehended.