

1692. December 22.

KINCAID against ANDERSON of Dowhill.

No 62.

THE LORDS found the confirmed testament by the Commissary of Glasgow, a sufficient warrant and security whereon Dowhill might pay ; though the defunct did retire, about a fortnight or twenty days before his death, into the bounds of the commissariat of Campsie or Hamilton ; and Dowhill contended the confirmation ought to be made there ; and that any hereafter confirming there, will be preferred to Kincaid, as having right *a non suo judice* ; for the LORDS considered his domicil as still at Glasgow, and that twenty days did not translate or give him *forum et larem* elsewhere ; though he had no family, and by removing himself out of Glasgow, he could say with Bias the philosopher, *omnia mea mecum porto*.

*Eol. Dic. v. I. p. 331. Fountainball, v. I. p. 536.*

1708. January 7.

LORD MERSINGTON'S Creditors competing.

No 63.

SIR ALEXANDER SWINTON of Mersington having given L. 100 Sterling to the African Company, as a part of L. 400 he signed for Sir Alexander Cuming of Culture, his son-in-law ; James Blackwood, Rothead of Whitsomhill, and other creditors, confirm themselves executors creditors to him in that sum, by the Commissaries of Edinburgh. Sir John Swinton, his nephew, being also a creditor, he confirms himself before the Commissaries of Lauder ; and in a competition, Culture, &c. craving preference, as being first confirmed, Sir John objects, That they had confirmed in the wrong court ; for his estate lying in the Merse, and his lady and family there, and it being his principal messuage, the confirmation at Lauder was the most formal, legal, and competent, in which jurisdiction his lands lay, especially considering that he died there. *Alleged*, That by his station as a Lord of the Session, he was tied to Edinburgh for six months in the year, and his attendance on the bills, &c. even required a part of the other six ; so Edinburgh behaved to be his principal residence, and his going to his country house could be looked on as no more but a recess for his diversion and recreation ; and Edinburgh is the *communis patria* to all Scotsmen ; and so *mobilia sequuntur personam* ; and where he most resided, there his effects must be confirmed. *Answered*, Where a man has more domicils than one, (as the most in public offices and stations have) the characteristics to discern the principal, are, where his wife, family, and servants stay ; where his land-estate lies ; where he chuses to reside when the affairs of his employment supersede his attendance ; and where he happens to die ; now all these concur for his house at Mersington, to sustain the confirmation by the Commissary of Lauder ; for there he had fixed his estate ; there his Lady and family dwelt ; there he laboured a room ; whither he retired in the vacance ; and there he died ; *l. 7 C. de incolis*,

The testament of a Lord of Session being confirmed in Edinburgh and also in the country, where his estate lay and where he died, the Lords preferred the confirmation before the country Commissary.

No 63.

determines a principal dwelling, and defines it thus, *ubi quis larum rerumque ac fortunarum suarum summum constituit, unde rursus non sit discessurus, nisi aliquid necessarium avocet*; so it makes the principal domicil to follow his property; and if he by his station and trust be called to live *alibi*, that is not reputed to be *animus remanendi*, nor his free option, but rather *ex necessitate officii*, as Stravius in his *Syntagma jur. civilis universi, tit. 25.* says, *quod principum consilarii licet per decem annos in urbe degant non videntur ibi domicilium contraxisse, quia non animo in urbe domicilium constituendi, sed ratione officii ibi vivunt*; and so it was decided in the Earl of Panmuir's case, No 60. p. 4847, where the Commissary of Brechin was preferred to the confirming his testament, before the Commissaries of Edinburgh, though he had lived half a year in Edinburgh; because he was only there attending his law business, and had the bulk of his family living at Panmuir. Some of the LORDS moved, that both places might be reputed his domicil, and so both Commissariots were his *forum competens*, which would bring them in *pari passu*, each confirmation being *in suo genere* formal; but the vote was stated, Prefer the confirmation at Edinburgh or at Lauder; and the LORDS being equal, six against six, the President decided it in favours of the confirmation at Lauder, and so preferred Sir John Swinton. If there had not been two confirmations, it was thought the testament confirmed at Edinburgh would have been sufficient warrant for the Commissioners of the Equivalent to have paid on it; but in the competition between the two, the LORDS preferred that of Lauder as more legal.

*Fol. Dic. v. 1. p. 330. Fountainball, v. 2. p. 415.*

No 64.

The testament of a soldier dying without any fixed habitation in a town where the regiment he belonged to had lain 60 days before his death, ought to be confirmed by the Commissaries of Edinburgh *tanquam commune forum*, unless the defunct had resided in that town 40

days immediately preceding his death.

1711. February 16.

JANET NISBET and PATRICK BELL merchant in Glasgow her Husband *against* JOHN MONRO Chirurgion in Edinburgh, and his Spouse.

JOHN NISBET lieutenant in Colonel Moncrieff's regiment, having died at Glasgow where the regiment lay at the time, there arose a competition for his share in the equivalent, betwixt Janet Nisbet executrix creditrix to him confirmed before the Commissary of Glasgow, and John Monro confirmed executor creditor to him before the Commissaries of Edinburgh. John Monro craved to be preferred, because, *imo*, All testaments ought to be confirmed in the commissariot where the defunct dwelt, Stair Instit. title Executry, § 81. Commissaries of Edinburgh and Brechin *contra* Earl of Panmure, No 60. p. 4847; for the act 1609, establishing the jurisdiction of Commissaries, restricts it to persons dwelling within their respective bounds; and *'domicilium est ubi quis sedes et tabulas habebat, suarumque rerum constitutionem fecit, L. 203. ff. de verb. Signif. or, ubi quis larum rerumque suarum summam constituit, L. 7. Cod. de Incolis;* whence it is clear, that in the constitution of a dwelling place, *animus remanen-*