

coming betwixt the two; and if 40 days were required, they might shift both jurisdictions, and be convenable in neither, seeing they will scarcely be 40 days together in any of the two; therefore the LORDS in such a case thought them liable to both, and therefore repelled Prestongrange's reason of advocacy, and remitted the cause to the Sheriff. Some thought the proper remedy was to pursue such whose domicil was in a manner in both shires only before the Lords.

No 10.

Fol. Dic. v. 1. p. 326. Fountainball, v. 2. p. 119.

1708. February 14.

THOMSON and PROCURATOR-FISCAL of Dumblane against WRIGHT.

No 11.

THE LORDS turned into a libel the decree of an inferior Judge, fining a party for a riot, in regard of the incompetency of that court to judge therein; in so far as the *locus delicti* was within another jurisdiction; wherein also the defender had his *forum domicilii*, being at that time resident at a writer to the signet's country-house, whose apprentice he was, though not an house apprentice; and although the father, whose eldest son he was, had both his dwelling and whole estate within the jurisdiction where the son was attached.

Fol. Dic. v. 1. p. 326. Fountainball.

* * * See this case, No 14. p. 2921.

1709. November 12. LEES against PARLAN.

JAMES PARLAN having been entertained at bed and board for three years together, by James Lees merchant in Cashel, in the county of Tipperary in Ireland, and afterwards taking on to be a soldier in Colonel Ferguson's Cameronian regiment; and Lees having got no payment, he pursues him before the bailies of Perth in March 1702, where the regiment then lay quartered, for L. 32 Sterling, as his aliment foresaid; and Parlan being personally apprehended, is holden as confessed, and decret pronouncd against him, and thereon an adjudication is led of some acres belonging to him, lying near the town of Glasgow, dated in November 1703. Parlan the debtor, dying in Flanders, one Duncan Parlan, his cousin, serves heir to him, and pursues a reduction of the foresaid two decreets, one constituting the debt, and the other of adjudication; and against the last, offered to prove he was dead long before the pronouncing of it; and a commission being directed to Flanders, it was this day found proven by the clear testimonies of his fellow soldiers in the same company and regiment with him, that he died in June 1703, and they were at his burial; whereupon the

No 12.

A soldier may be cited at the place where he resides, though he has not been 40 days there.

No 12.

Lords reduced the adjudication, as pronounced after he was dead, and so null. But Parlan, the heir, was nothing the better of this, so long as the decreet of constitution of the debt stood; for, though Lees lost the bygone accumulations, yet he could adjudge the same land of new. So Parlan repeated his reasons of reduction against the first decreet, and *primo loco* insisted on this, that he offered to prove that he was *alibi* the time of the said decreet; and Lees offered to prove he was actually then at Perth, and accordingly led a probation, which amounted to this, that the town officer deponed, he cited him personally apprehended, and his procurator declared, that he was employed to compear for him, and did take up the process, and acquainted him that the debt and account were referred to his oath of verity, and he refused to go to the court and swear, so that decreet went out against him. Some contended his being there was not sufficient to found the bailies jurisdiction over him, but it was still *a non suo iudice*, unless it were proven he was there 40 days before, which makes a domicil; but the Lords thought soldiers had no fixed dwelling, but must remove at their Captain's order, unless they be in garrison or winter quarters; and therefore found it sufficiently proven, that, at the time of the citation and decreet, he was at Perth. Then he repeated his other reasons of reduction, *imo*, That the decreet was null, being by an inferior judge in time of the vacance, without a dispensation from the Lords. *Answered, imo*, Magistrates of royal burghs need no dispensation, but hold courts all the year, as is known in Edinburgh and many other places. *2do*, By custom they sit without dispensation till the 20th of March and August, and this was on the 7th of March, and so needed none.—THE LORDS repelled the nullity. *2do*, *Objected*, this was a pursuit at the instance of one out of the kingdom, and no mandate, commission, or factory from him. *Answered*, Gught to be repelled, for, *imo*, The account subscribed by Lees was produced, which was a sufficient mandate, and Perezius *ad tit. cod. de postulando et de procuratoribus* says, the having and producing the pursuer's writs implies a tacit mandate. *2do*, There is a factory now produced, which, if it had been called for, would have been given in to the process.—THE LORDS repelled the objection. *3tio*, *Alleged*, the account was most exorbitant, being L. 10 Sterling a year for this poor man's aliment, the half being enough for him.—THE LORDS would not loose the decreet for this, but declared they would restrict and modify it. *4to*, *Objected*, that the Bailies committed manifest iniquity in refusing to ordain the pursuer to give his oath of calumny on the libel and account. *Answered, imo*, This was plainly sought *animo protelandi*, the pursuer not being on the place, but living in Ireland, and being *in facto proprio*, it could not be an oath of calumny, but of verity; and he being made judge of the account, by being referred to his oath, it was more just he should have compeared and deponed, than humorously to insist on the pursuer's oath; and yet he shunned to appear himself, because he durst not upon oath deny the verity of the account. *2do*, The pursuer produces a second extract of the same decreet, making no mention, that the oath of calumny was so much

as sought.—THE LORDS found this no nullity, unless he had been cited to give his oath of calumny; but taking notice of the disconformity of the two extracts, contradicting one another, they ordained the solicitors to cause cite Graham, the clerk of Perth, to answer for that malverse in his office; and if he cannot clear himself, then to be fined and censured by the Lords.

Fol. Dic. v. 1. p. 326. Fountainball, v. 2. p. 525.

No 12.

1743. *January 26.* THE BARBERS OF EDINBURGH *against* WILSON and BLAIR.

IN an action at the instance of the Barbers of Edinburgh against Wilson and Blair, barbers in Canongate, for shaving, &c. within the town of Edinburgh, though not freemen of the city, it was controverted, *1mo*, Whether action lay, seeing the defenders were not apprehended in the actual transgression; and *argued*, that it did not, from the analogy of the 24th act, Parliament 1633, and act 5th, Parliament 2d, sess. 3d, Ch. II. which were acts made for securing burghs from unfree traders, and whereby the penalty of contravention is declared to be confiscation of goods; but it is therein expressly enacted, that the Magistrates of burghs shall not, on the account foresaid, trouble or molest the lieges, unless the delinquents be apprehended in the actual and present transgression of the privileges of the burgh. And, *2do*, Whether the defenders, who were not resident in the town of Edinburgh, were amenable before the Dean of Guild of Edinburgh.

THE LORDS found, that the action lay, and that the analogy from the statute did not apply; and that the defenders being cited within the town of Edinburgh, where the trespass was committed, were regularly cited.

Such is the criminal law in general, that where a delinquent is cited within the territory in which the delict is committed, he is amenable to the courts of that territory.

Kilkerran, (DELINQUENCY.) No 8. p. 159.

1745. *June 11.* REBECCA DODDS *against* WESTCOMB.

WILLIAM WESTCOMB, an Englishman, who had an office in the Exchequer in Scotland, and had for some years resided in Edinburgh, having given up his office and retired to England, a process of declarator of marriage and adherence was brought against him by Rebecca Dodds, before the Commissaries of Edinburgh, with a conclusion that, failing his adherence, he might be decerned in a certain sum in name of aliment; wherein appearance having been made for him, with a declinator of the Commissaries' jurisdiction, as he was neither a native of the country, nor had either residence or effects in it, the Commissaries

No 13.

Inhabitants of Canongate were found amenable to the Courts of Edinburgh, when prosecuted for infringement of the privileges of the burgesses of Edinburgh.

No 14.

In a process of declarator of marriage, it was objected for the defender, that tho' he had an office in the Exchequer in Scotland at the time of the alleged marriage, yet,