

Which, as it is an authority in point, so the uniform practice has been, when encroachments of this kind were attempted, to issue such precepts; therefore it is not to the purpose, whether a confirmation by an incompetent commissary would be available or not, seeing it is plain the creditors have in view to establish a title, in virtue of which they may intromit with the moveables; and, as these may be embezzled, it cannot be officious in the commissary, to whom the law has entrusted the charge of the defunct's effects, to prevent their being intromitted with by one having no right; but, as it is plain the commissary has a privative jurisdiction in this question, he may vindicate his right, and reclaim any process intended before an incompetent court, as is practised by the Judge-Admiral in maritime causes. No 269.

Upon the *second* point, it was observed; That here the only question is, with respect to the fact, viz. within what jurisdiction the defunct's principal domicile lay, as it is that must determine the legal situation of his moveables. Taking the matter in this view, the right is clearly on the side of the Commissary of Hamilton; for the definition of a domicile is, *Ubilarem rerumque ac fortunarum suarum summum constituit*; which, from the circumstances of this case, is the estate of Edlewood, where the defunct resided constantly every year, for several months; and even kept servants there the rest of the year, when, for the conveniency of living, he chose to leave the country, and live in a town.

There is therefore a great difference betwixt this domicile, where he died, and that of Glasgow, which is established only from the defunct's being a merchant, sometimes in the magistracy, and residing some months in that town; which being neither fixed, nor its nature perpetual, can never compete with that which a gentleman has fixed in the country, upon his own estate. Besides, if there was any dubiety in the matter, the presumption is for the original domicile, or, as Voet explains it, in his title *De Indiciis*, § 97. the *Domicilium paternæ habitationis*. See Simon Vanleuen in his *Censura forrensis*, l. penult. *De Senat.* Competition, Creditors of Lord Kimmergham, No 67. p. 4854.

THE LORDS found it not competent to the Commissary of Hamilton to object to the confirmation before the Commissary of Glasgow.

C. Home, No 63. p. 110.

1725. January 28.

JOHN WHITE of BALLO against DAVID SIBBALD and Others.

No 270.

BALLO having charged upon a decret of the Commissary of St Andrews, for payment of a sum decerned for on account of a scandal, the decret was suspended upon the head of iniquity in the judge, for repelling a just defence, and imposing an exorbitant fine. Ballo *alleged*, that if the suspension should be sustained, it was in effect to reduce the Commissary's decret, which could

No 270.

only be competently done by the Commissaries of Edinburgh at the first instance, agreeable to the act of Parliament 1609, and a decision 23d July 1624, Herries against Drumlanrig, *voce* TEINDS.

It was *answered*, That the act of Parliament as to that point was in desuetude, and the decision had not been followed for upwards of 100 years.

THE LORDS repelled the defence of the Commissaries of Edinburgh's jurisdiction.

Reporter, *Lord Cowper.* Act. *Alex. Hay.* Alt. *Ja Morison.*

Fol. Dic. v. 3. p. 354. Edgar, p. 159.

1763. February 18.

COMMISSARY OF ABERDEEN *against* COMMISSARIES OF EDINBURGH.

No 271.
The Commissaries of Edinburgh have no power to advocate causes from inferior Commissaries.

In a process of scandal and verbal injury, the Commissary of Aberdeen pronounced an interlocutory sentence, 'decerning the defender to appear in the court and to ask pardon of the pursuer, &c. and decerning him to pay a certain sum for damages and expenses.' The defender, dissatisfied with this sentence, presented a petition of appeal to the Commissaries of Edinburgh, praying, 'That the said interlocutor be reversed, and such other relief and indemnification be given him as to them shall seem meet.' The Commissaries of Edinburgh granted a deliverance upon this petition of appeal, 'Appointing the same to be intimated to the pursuer, or to his procurator at Aberdeen; and appointing the pursuer to give in answers within twelve days after the intimation.' And having thereafter resumed the consideration of the appeal, they gave the following deliverance: 'The Commissaries having considered the petition of appeal, with their interlocutor thereon, duly intimated, to which no answer has been given, they remit the cause to the Commissary of Aberdeen with the following instruction, 'that he yet allow a reasonable time to the defender for begging pardon of the pursuer, &c.'

The Commissary of Aberdeen, being advised that the Commissaries of Edinburgh have no power to take causes from his court, whether by advocacy or appeal, advocated this cause to the Court of Session, upon the single head of incompetency. And the bill of advocacy being reported to the Court, they appointed excerpts of the statutes and instructions concerning the jurisdiction of the Commissaries of Edinburgh to be laid before them, which being done, the following considerations occurred to the Judges at advising; the form of an appeal is contained in act 99. Parliament 1503, binding the appellant to find caution in the inferior court within a time specified. This form gave place to advocations which did not require such caution. And Stair bears testimony that appeals went out of use after the institution of the Court of Session, giving place to advocations, reductions, and suspensions. With respect to advo-