

1672. February 6.

The COMMISSARIES of EDINBURGH and BRECHIN *against* The EARL of PANMUIR.

In a suspension of double poinding, raised at the Earl of Panmuir's instance, who was charged to confirm his father's testament by the Procurator-fiscal of both the commissariots, it was *alleged* for the Commissaries of Brechin, That they ought to be preferred, because the deceased Earl's principal dwelling-house and chief residence being at Panmuir, where he always kept his servants and remained himself with his family, except when upon occasions of private business or law-suits he came to Edinburgh; albeit he died there, it did not take away from the Commissaries of Brechin the benefit of the confirmation of his testament. It was *alleged* for the Commissaries of Edinburgh, That by our law and custom, wheresoever a person dies, having his family with him, and *habens larem et focum* where he hath resided by the space of forty days before his death, his testament ought to be confirmed within that commissariot where he dies. It was *replied*, That forty days residence was only sufficient to make legal diligences valid, bearing executions to be at their dwelling-place, but was not to be considered as to the point in question.

THE LORDS did prefer the Commissaries of Brechin, notwithstanding it was offered to be proven, that the defunct had taken the Dean of Edinburgh's lodging for a year, and had brought over his lady, children, and servants, and kept house there by the space of three months before his death; which was hard.

Fol. Dic. v. 1. p. 330. Gosford, MS. No. 461. p. 239.

. Stair reports the same case :

THE Commissary of Brechin having charged the Earl of Panmuir to confirm the Earl his father's testament, he suspends on double poinding, and calls the Commissaries of Edinburgh; who *allege* the confirmation belongs to their office, because the Earl lived several months at Edinburgh, with his lady, servants, and whole children, and had a house taken for a year, furnished with his own plenishing, where he died; and therefore, having his domicile *larem et focum* at Edinburgh, the Commissaries of Edinburgh must confirm. It was *answered*, That the allegiance ought to be repelled; because, though what is alleged might be sufficient, if the defunct had not had a more principal residence; but his principal residence being within the commissariot of Brechin, most of his servants, furniture, and labourage being there, and he entertaining a family there, and not being at Edinburgh *animo remanendi*, but about business, he changes not thereby his domicile; otherwise the whole lieges coming to Edinburgh for affairs, and oftentimes having their wives with them, should fall to have their testaments confirmed at Edinburgh, if they happened to die there; which would exceedingly wrong all the rest of the Bishops and Commissaries; and that *animus remanendi* is requisite to constitute a domicile for confirmation is

No 60.

In the confirmation of a defunct's testament, the Commissary of the district was preferred, where the defunct's principal residence was, and where his estate lay, tho' he had a house taken in Edinburgh for an year, lived with his family and died there; he not residing there *animo remanendi*, but about business.

No 60.

clear; for, though a merchant should go out of the country, and stay several months and die, he changes not his domicil, not being there *animo remanendi*; and his testament is not to be confirmed in Edinburgh, *ut in communi patria*, as those who die as Scotsmen residing out of the country, as the Lords found Douglas *contra* Johnston, No 59. p. 4846., which though it was stopped by a bill was never recalled; and though, as to citation and *competentia fori*, forty days residence in Edinburgh may be sufficient, yet it cannot as to the quot and confirmation.

THE LORDS preferred the Commissary of Brechin.

Stair, v. 2. p. 67.

* * Dirleton also reports the same case:

THERE being a competition betwixt the Commissaries of Edinburgh and the Commissaries of Brechin, to which of them the confirmation of the Earl of Panmuir's testament should belong; the said Earl having taken a house and staid a whole session in Edinburgh, with his lady, children, and family, in order to the breeding of his children and other occasions; and having died there,

THE LORDS preferred the Commissaries of Brechin, being Commissaries of the place where the said Earl had his principal dwelling, and his interest and estate.

Dirleton, No 159. p. 64.

1684. February.

COMMISSARIES of Edinburgh *against* The COMMISSARY of St Andrew's.

No 61.

Although a person die abroad, if he did not reside there, *animo remanendi* his executry must be confirmed in the district where he had chiefly resided.

IN a competition betwixt the Commissaries of Edinburgh and St Andrew's, for the power of confirming the testament of a Scots skipper, who had gone upon a voyage to Holland, where he died before his return;

Alleged for the Commissary of St Andrew's; That the benefit of the confirmation belonged to him, in respect the defunct's wife and family lived in St Andrew's.

Answered for the Commissaries of Edinburgh; That Edinburgh was *communis patria*, and the skipper being 40 days abroad, is presumed to have fixed his domicil in Holland.

Replied; By the act 88, Parl. 6th, James I, the testament of Scotsmen dying before their return from abroad, whither they had gone *sine animo remanendi*, are to be confirmed before their ordinaries; for though goods in Scotland belonging to strangers and foreigners, are to be confirmed by the Commissaries of Edinburgh, as *communis patria*, whether the owners died there or elsewhere; yet it is otherwise with Scots subjects, who go abroad *sine animo remanendi*; and the skipper's family in Scotland took off all presumption of a design to set up in Holland.

THE LORDS preferred the Commissary of St Andrew's.

Fol. Dic. v. 1. p. 331. Harcarse, (EXECUTRY.) No 459. p. 125.