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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-*

*di* is more considered than the actual stay; and forty days residence in a place, makes a man convenable there, not because his *domicilium* is presumed where he hath remained so long, but for that he is supposed to have leisure to defend himself, *L. 17. § 2. ff. de judiciis*. But, 2do, Lieutenant Nisbet could not be understood to have had his dwelling-place at Glasgow, seeing he was a young unmarried soldier, subject as to his abode to the arbitrary orders of others, and so could have no fixed habitation *animo remanendi*. For *L. 23. ff. ad municipalem, miles ibi videtur habere domicilium, ubi meret*, takes only place where the regiment itself hath a certain place of residence, as *Legio Parthica, Legio Feretensis, Fretensis, &c.* had in those provinces where they were quartered and paid for defence thereof. So soldiers in the castle of Edinburgh, or any other fixed garrison, have the garrison for their habitation, while they continue there; but when sent elsewhere upon expeditions, are held as *peregrini*, under which denomination all soldiers fixed to no certain post may be comprehended. 3tio, The Commissaries of Edinburgh have an undoubted right to confirm the testaments of all persons wanting a fixed abode, seeing where no inferior Commissary is competent to confirm, it is necessary to recur to the *judex communis patriæ*; as the Commissaries of Edinburgh only, for the same reason, have the privilege to confirm the testaments of such as die abroad out of the kingdom. Especially considering, that it was once the privilege of these Commissaries to confirm the testaments of all in Scotland, where the dead's part exceeded L. 50 Scots, as appears from the instructions to them under the Queen's hand *anno 1563*, inserted in Balfour's Practicks. See APPENDIX.

Replied for Janet Nisbet, Though a man's casual stay at a certain place for a little time doth not determine his *domicilium*, to make him *incola*, to infer *honores, et onera*, immunities and burdens, or to subject him to answer to actions laid against him, *L. 7. Cod. de Incol. L. 203. ff. de Verb. signific. L. 19. ff. de judiciis*; yet it is sufficient to constitute his *domicilium* for confirming his testament; except he had, as in the Earl of Panmure's case, a principal fixed residence elsewhere. And *L. 23. § 1. ff. ad municipal*, making a soldier's dwelling-place to be *ubi meret* doth determine John Nisbet's at Glasgow, where he resided at the time of his death with the regiment. For the Roman regiments called *Parthica, Feretensis, &c.* were as much moveable, and under command, as any others; and the privilege of making a will *more militari* was not competent to them, because residing in such countries, seeing soldiers *in adibus* or *sedibus suis*, behoved to make their testament *more vulgari*, and the privilege of a military testament was indulged only to those *in procinctu*. 2do, Though the Commissaries of Edinburgh confirm the testaments of those who die abroad, they have no privilege by the act 1609, as to confirming the testaments of persons dying within the kingdom, which must be confirmed by the Commissary of the particular bounds.

THE LORDS found it relevant to prefer John Monro to the subject libelled, that John Nisbet, soldier, had not resided at Glasgow forty days immediately be-

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fore his decease, and had no fixed domicil there ; notwithstanding that the regiment in which he was a soldier had resided at Glasgow sixty days before his death. For the LORDS found, that in that case his testament ought to have been confirmed by the Commissaries of Edinburgh, *tanquam commune forum*.

*Fol. Dic. v. 1. p. 331. Forbes, p. 498.*

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1711. February 22.

JOHN HENRY Cordiner in Edinburgh *against* JOHN GLASSELS Merchant in London, and his Factor.

No 65.

A person died in the expedition to Darien before he went out of the Scottish seas. The confirmation of his testament in the commissariat of Glasgow was preferred to another confirmation before the Commissaries of Edinburgh, in respect the defunct left his wife and family in Glasgow, where she carried on his former trade.

IN the competition betwixt John Henry and John Glassels, both executors creditors to Thomas Glassels, who died in the expedition to Darien before he went out of the Scottish seas ; THE LORDS preferred John Henry, who confirmed in the commissariat of Glasgow, to John Glassels who had confirmed before the Commissaries of Edinburgh, in respect the defunct had left his wife and family at Glasgow, where she lived prosecuting his former trade of a merchant, till they got notice of his death. Albeit it was *alleged* for John Glassels, That the defunct having gone abroad, in order to be a planter in Darien, either his *domicilium* behoved to be reputed in Darien, where he designed to fix and plant, *L. 27. ff. ad municipal* ; or, he must be understood to have had none at all, from his intention to desert his former habitation, and set up elsewhere, *Ibid. § 2. in fin.* ; in either of which cases his testament could only be confirmed in the commissariat of Edinburgh, as *commune forum* ; and it is not the wife's residence that makes the husband's dwelling place, but she follows his :—In respect it was *replied* for John Henry, That a man cannot be thought to change his habitation by changing his manner of living, from a close shopkeeper, to that of a travelling merchant ; or by taking up a design to settle abroad, till he actually settled and resolve to continue there ; for the definition of *domicilium, ubi quis sedes & tabulas habet, & rerum suarum constitutionem facit*, runs in the present, and not in the future time. And it is unreasonable to assert, that a person went abroad (*animo remanendi*) to a place he had never seen, and where he knew not what reception he would meet with.

*Fol. Dic. v. 1. p. 331. Forbes, p. 503.*

No 66.

1742. June 17. Competition ANDREW CHALMERS with JOHN BLAIR, &c.

In a competition between two persons, one of whom had applied to be deemed executor

JOHN BLAIR having moved an edict before the Commissaries of Edinburgh for decessing him executor *qua* creditor to the deceased Mr Hugh Murray Kynnynmound, advocate ; compearance was made for Mr Chalmers, who had been declared executor *qua* creditor to Mr Murray before the Commissaries of St An-