

1737. June 29.

The CREDITORS of the deceased ARTHUR TRAN *against* The COMMISSARY of Hamilton.

No 269.

The Lords found it not competent for one Commissary to stop a confirmation going on before another.

THESE creditors procured an edict from the Commissary of Glasgow, for serving themselves executors-creditors to the said Arthur Tran, believing that to be the proper place for confirming themselves, their debtor having been, at the time of his death, and for several years before, a merchant in Glasgow, who resided there the most part of the year, and bore the office of Dean of Guild when he died; but the Commissary of Hamilton opposed the confirmation, *alleging*, That it properly belonged to him, in regard the defunct died at Edlewood, a house belonging to himself in the parish of Hamilton, upon an estate handed down to him from his ancestors, where he usually lived several months in the year, and at which he actually had been with his wife and family several months before his death.

*Answered* for the Creditors, Now that quots are abolished, and the necessity of confirming taken away, it is *jus tertii* to the Commissary to oppose this confirmation, as he has no interest himself in the estate of the defunct; for he can neither force any to confirm, nor can he stop a confirmation that is going on, or delay the creditors from entering to their debtor's effects, who, if they please to run the hazard, may possess without confirming at all; or, if they confirm before an improper judge, it could have no effect in competition with other creditors. But still the Commissary has no right to quarrel it, as every creditor must be allowed to judge for himself what he takes to be the proper place for deducing his diligence, seeing it is at his own risk if it is improperly led. *2do*, Supposing this were a competition of diligence betwixt creditors, it is believed there could be no doubt but the commissariot of Glasgow would be found the only proper jurisdiction for confirming the testament of this defunct, in regard his chief residence was in Glasgow. It may be true, that he sometimes resided in the summer-time in the country with his mother, who liferented the estate; but then it was more properly as a visit than as having any house of his own there, and a person's happening to be absent, at the time of his decease, from the place of his chief residence, can make no alteration, if he retained the purpose of returning.

*Replied* for the Commissary, to the *first*; Though he does not pretend to compel any of the lieges to confirm, yet, if a testament of a defunct, dying within his jurisdiction, is to be confirmed any where, he has a legal interest to oppose its being expedie by an incompetent judge, conform to the regulations 1666; the 14th article whereof provides, 'That if any temporal judge within this realm will proceed in causes belonging to your jurisdiction, you shall direct precepts for inhibiting them from all further procedure thereinto.'

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