No 64. 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.

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 commissariot 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 commissariot 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 commissariot 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.
In a competition between two persons, one of whom had applied to be decerned executor

1742. *June* 17. Competition Andrew Chalmers with John Blair, &c.

John Blair having moved an edict before the Commissaries of Edinburgh for decerning 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-

No 66.
qua creditor by the Commissaries of Edinburgh, and the other had been decerned executor by the Commissary of St Andrews, the latter was preferred, because the defunct, though a lawyer in Edinburgh, had his principal dwelling house in the commissariot of St Andrew's.

drews; and it was *objected* for him, that there could be no confirmation of executors before the Commissaries of Edinburgh, but allenarly at St Andrews, because although the defunct was a lawyer and pleader before the Lords, yet his principal dwelling-house was at Lochgelly in Fife, which is in the commissariot of St Andrew's; and that, for five or six years before his death, he had grass parks and labouring in his own hands, and great works of inclosing his ground going on at Lochgelly, where he had servants constantly residing, and that himself and family resided always there during the six vacation months, when his house in Edinburgh was locked up; therefore, as Lochgelly was his chief domicil, the Commissary of that bounds is he who only can confirm the whole executry.

Answered for John Blair, That Mr Murray laid his account with residence at Edinburgh during life, where he practised as a lawyer; that in that view, he bought and furnished a dwelling-house in Edinburgh, in which he and his family resided, and where he died. It is true some years before his death he succeeded to the estate of Melgund; and as there happened to be a country-house on part of that estate at Lochgelly, he gave over a country-house he had near Edinburgh, and went there some part of the vacation; and for his diversion he possibly might take some of the parks. However, his first residence in the prosecution of his business was still in his house in Edinburgh, not only during the session, but even during a good part of the vacation, he being one of the town's assessors; so that there is no reason to think that he had any *animus* or intention to change the *locus domicilii* which he had once deliberately fixed. If the house of Lochgelly had been the seat of an antient paternal estate, in which Mr Muray and his forefathers had always resided, there might have been some pretence for considering it as his proper domicil, for which, *ratione originis*, he might have had a particular affection; but that was not the case. In short, Mr Murray's occasional residence at Lochgelly cannot be understood *animo remanendi*, but only as a sort of recess for amusement and recreation.

THE LORDS passed Mr Chalmers's bill of advocation, and remitted to the Commissary of St Andrew's to proceed in the edict of confirmation at the instance of the said John Blair.

Fol. Dic. v. 3. *p.* 241. *C. Home, No* 194. *p.* 324.

*** Kilkerran reports the same case:

AN advocate's domicil found to be at his house upon his estate in the country, where he resided with his family in vacation time, notwithstanding his constant residence at Edinburgh in session time, and even often in vacation time, where his business as town's assessor and practice before the Admiral Court often called him; and that therefore his testament was to be confirmed, not at Edinburgh, but at St Andrew's, within which diocese his said house lay.

No 66.

The like had been found in the case of a Lord of Session's testament, Creditors of Lord Mersington competing, No 63. p. 4849.; and more lately by interlocutor in the case of the Lord Kimmergham's testament, No 67 *infra*. It is true, there was no decree in that case, a petition against the interlocutor having been appointed to be seen and answered, which never was advised.

Kilkerran, (Forum Competens.) *No* 1. *p.* 213.

No 67.
A confirmation *ad omissa* of the library of a Lord of Session in the commissariot where the library was, was preferred to a confirmation in Edinburgh. See No 63. p. 4849.

1753. *January* 19. William Hall *contra* M'Aulay and Lindsay.

Upon the death of Sir Andrew Home of Kimmergham, one of the Lords of Session, which happened at Edinburgh in March 1730, M'Aulay and Lindsay merchants there, furnished black cloth, linens, &c. for the defunct's children and servants, and for the widow. M'Aulay's account amounted to L. 70 Sterling, and Lindsay's to L. 35, which were afterwards constituted by decreets of cognition. To recover payment, they confirmed the defunct's library in the Commissary court of Edinburgh. Mr William Hall, another creditor, confirmed the same subject in the Commissary court at Lauder, within which jurisdiction was the family-seat of Kimmergham, where the defunct constantly resided, unless when attending his duty in Edinburgh. In a multiple-poinding Mr Hall's confirmation was preferred. But M'Aulay and Lindsay insisting that their claim was a privileged debt, this point was remitted to the Ordinary. In the mean time it was agreed betwixt the parties, that Mr Hall should receive the price of the library, out of which he was to pay the two accounts due to his parties, upon bills to be granted by them, which were to be paid or retired according to the event of the process.

Matters lay over in this state till Mr Hall's death, when his heirs put the two bills in suit. The defence arose from the above history, viz. That the bills were not due, because the defenders were privileged creditors, and preferable to Mr William Hall.

The Lords sustained the defence; but reserved to the pursuer to object against any articles that were not to be used at or before the interment, according to the custom of the country.

The interlocutor went upon this footing, That hanging a room with black, putting the wife and children in mourning, and the servants employed in the solemnity of the interment, are articles to be considered as part of the funeral expenses, where the condition of the defunct makes these articles necessary, or at least decent. I was of opinion, that as these articles hitherto, for what I could see, had not been reckoned part of the funeral expense, I was not for extending this claim as a privilege in *necem creditorum*; that extravagant buryings had been in fashion and might again be, that scarfs and mourning-rings might become the fashion here as in England; and that it would be hard to