

1697. July 1.

COMMISSARY OF MURRAY *against* COMMISSARY OF EDINBURGH.

THE debate between Mrs Lucia Monro, relict of William Calder of Spynie and Sir James Calder of Muirton, was decided. She having applied to the Commissary of Murray, to be confirmed as executor-creditor on her contract of marriage to her husband, Muirton competing for the office, was preferred to her. Of this decret-dative she raised a reduction before the Commissaries of Edinburgh, and they reduce Muirton's preference as iniquitous, and issue out edicts for confirming the relict executrix before themselves. Muirton gives in an advocacy of this edict, on which a competition arises between the two jurisdictions; the Commissaries of Edinburgh *allege*, they are not Diocesan Commissaries, but have an universal jurisdiction over all the other Commissaries, not only to reduce their decreets when unjust, but likewise to proceed to confirmation, seeing the inferior Commissary, by his iniquity committed, ought to forfeit the casualty, and should not be a gainer by his injustice; for, when the Commissaries of Edinburgh turn one of these inferior decreets into a libel, they send it not back again, but proceed to determine in the cause.—*Answered*, Whatever jurisdiction the Commissaries of Edinburgh had before the sixth act of Parliament 1609, the same is now qualified and restricted since that act, which expressly bears, that every Bishop and his Commissaries shall have the power of the confirmation of testaments within his own bounds; and for the Commissaries of Edinburgh to usurp the confirmation of a man's testament dying in Murray, is as irregular and anomalous as if the Commissary of Murray would confirm a Burgess of Edinburgh's testament dying at Edinburgh; the one being as much *extra territorium* as the other; and the preferring the relict to the office seems not very consonant to the Lords' decisions, who, on the 17th of February 1688, Keith against Keith, *voce* PRIVILEGED DEBT, found the relict had no such privilege on the personal obligations in her contract to prefer her to other creditors, unless she apply *debito tempore*, within six months after her husband's decease. It is not denied but the Commissaries of Edinburgh are founded *in jure* to reduce inferior decreets; but that being done, they are *functi*, and must remit it, though they might do it with such qualities and instructions as they see just; even as the Lords do in such cases where they are not competent *in prima instantia*.—THE LORDS found the Commissaries of Edinburgh had no right to confirm this testament, and so preferred the Commissary of Murray.

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The Commissaries of Edinburgh may reduce the decrees of other Commissaries, but cannot themselves proceed in the confirmations, disputed, but must remit with instructions.

*Fol. Dic. v. 1. p. 504. Fountainhall, v. 1. p. 781.*