

No 276.

1701. July 29.—In the cause, mentioned 20th July 1699, Mary Lyon against Gordon of Techmuiry, the probation being led, came to be advised this day; and the LORDS found it proven, that though he never owned her for his wife, yet they were generally habit and repute by the neighbourhood as married persons, and that he seized on her trunks and goods, which they thought sufficient to make him liable in an yearly aliment to her, though it might not amount to declare the marriage, or oblige him to adhere, which was not proper before the Session, but only competent for the Commissaries of Edinburgh; therefore, they modified yearly 200 merks, to be paid by him to her during her lifetime, and for her bygone expenses decerned him to pay her 200 merks more, and that presently; for the Lords thought, as he deserved to be punished for abusing her, so, on the other hand, women who prostitute themselves are not to be encouraged nor rewarded.

Fountainball, v. 2. p. 62, & 122.

1706. February 14. KER against CALDERWOOD and HAMILTON.

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Commissary's decret *cognitionis causa*, upon the extract of an apparent heir's renunciation, produced by a procurator compearing for him, sustained, altho' it did not bear expressly the apparent heir to have been cited in the process.

KER of Moriston against Thomas Calderwood in Dalkeith, and Hamilton of Eldershaw, reported by Rankeillor. This was a competition in the ranking of the Creditors of Home of Eccles. Moriston *objected* against the other two adjudications, that they were null, *imo*, Because their decret *cognitionis causa*, on which their adjudication proceeds, does not bear that the apparent heir was cited to the process, though a citation be one of the most essential parts of a pursuit, and *juris naturalis*, God himself not pronouncing sentence against Adam till he called him. *2do*, The decret is taken before an incompetent judge, viz. the Commissary of Lauder, against their injunctions. *Answered* to the *1st*, Though the decret do not specially bear these words, that he was lawfully cited, yet it is clearly implied in the production, mentioning the executions in general; likeas it is supplied by his compearing and producing a renunciation to be heir. To the *2d*, *Primus actus judicii vel est judicis approbatorius vel declinatorius*; but so it is, the defender appearing did prorogate and homologate the jurisdiction; and though, in the case of Weir of Blackwood, *infra* Div. 19. *b. t.* a registration in the Commissary's books was rejected, yet, to cast such decreets, would overturn many securities in the nation. THE LORDS remembered, in the case of Dewar and French, No 12. p 241. a decret was annulled for not mentioning the charge to enter heir, though it was now produced of a date anterior to the raising of the summons; but they thought this case not alike, and therefore repelled the objections, and sustained the decreets *cognitionis causa*, and of adjudication.

Fountainball, v. 2. p. 323.

* * Forbes reports this case :

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IN the ranking of the creditors of Eccles, it was *alleged* for Moriston, That Thomas Calderwood and Eldershaw's adjudications were null, as proceeding upon decreets *cognitionis causa* that were null : Because, *imo*, They are pronounced by the Commissary of Lauder, who was not competent to judge in the constitution of debts against representatives exceeding forty pounds. *2do*, They bear not the apparent heir to have been cited in the process ; and citation is a formality so essential in a decret, as the very omission to mention the giving thereof, though truly given, is a nullity intrinsic not suppliable, more than any solemnity forgot out of a sasine could be supplied. So in a case betwixt David French and Mr David Dewar, No 12. p. 241. a decret was found null for not bearing production of the bond libelled on ; and a second extract thereof found null in respect it did not mention the production of the letters of general charge to enter heir ; and these nullities not suppliable, albeit the bond and general charge were actually produced.

Answered for Calderwood and Eldershaw ; It were hard to overturn decreets of cognition obtained before Commissaries upon the head of incompetency ; seeing many diligences and securities of the nation are founded on such decreets. Besides, the Commissary's jurisdiction here was prorogated by a procurator compearing and producing a renunciation for the defender, and protesting to be assoilzied ; for, *primus actus judicii est judicis declinatorius*. *2do*, It is presumed that the apparent heir was legally cited, from his compearance by a procurator producing a renunciation, and proponing no such dilatory defence. Yea, the decret mentioning, that the Commissaries having considered the libel, bonds produced, general charge to enter heir, with the executions thereof, &c. ; the word executions must relate to the libel as well as to the general charge ; seeing there is but one execution of the general charge.

Replied for Moriston ; The production of a renunciation by a procurator officiously compearing for the apparent heir, is of no moment ; seeing the renunciation produced is but an extract of a general renunciation put in the register by the apparent heir, and probably taken out by the pursuer, and produced by a procurator employed by him. For the apparent heir's compearance could not be inferred from a procurator without a special mandate, or a principal renunciation.

Duplied ; As the procurator's compearance was profitable for the defender, in exeeming him from the passive titles, so the production of the renunciation wrs a sufficient mandate. For, what is more usual, than to see heirs refusing to enter, registrate a general renunciation, and give extracts thereof, when required, for avoiding the multiplicity of writing and subscribing renunciations.

THE LORDS thought this a quite different case from that betwixt Dewar and French, and therefore repelled the objections, and sustained the decreets of adjudication *et cognitionis causa*.

Forbes, p. 100.