

No 278.

1744. *January 25.* PRINGLE *against* PRINGLE.

ON the verbal report of the Lord Justice Clerk, it was found, that the Commissaries were judges competent to the reduction of a testament *ad effectum*: of determining, whether or not the office of executor was thereby conferred.

Fol. Dic. v. 3. p. 354. Kilkerran, (JURISDICTION of the COMMISSARIES.)

No 2. p. 301.

1747. *December 14.*The COMMISSARIES of EDINBURGH *against* The COMMISSARY of DUNKELD.

No 279.

The parishes of Abercorn, Cramond, and Aberlady, are within the commissariat of Edinburgh.

THE Commissaries of Edinburgh and Dunkeld raised mutual processes of declarator against each other, concluding, that the parishes of Abercorn, Cramond, and Aberlady, were within their territory, and that they had the sole right of exercising the commissariat jurisdiction over them.

This question branched into two, *1st*, Whether the disputed parishes had originally been part of the diocess of Dunkeld; and, *2dly*, Whether, supposing them so to have been, they were not made part of the commissariat of Edinburgh, upon the creation of that jurisdiction by Queen Mary, and remained so, notwithstanding the restoring to the Bishops the power of naming their Commissaries, and had been possessed accordingly.

Pleaded, 1st, for the Commissary of Dunkeld, He produces a charter by King James II. to the Bishop of Dunkeld, of the lands of Aberlady, Preston, Cramond, and Abercorn, erected into a free barony, which lands belonged formerly to the Bishop; *2dly*, Instrument of collation and institution, 1545, to the chaplainry of the Blessed Virgin at Aberlady, upon the collation of the Dean of the Cathedral of Dunkeld, and Vicar General thereof *sede vacante*, addressed *Decano Christianitatis nostræ, ex parte australi aquæ de Forth*; *3dly*, By the rental of the great benefices, given up at the general assumption 1561, the kirk of Bunkle and Preston in the Merse, the kirk and mains of Aberlady, the kirk and mains of Cramond, and the kirk and kirk-lands of Abercorn, make part of the benefice of the bishoprick of Dunkeld; as also, *4thly*, In the old rental of benefices, recorded in Exchequer, are contained the three parishes in question, and the feu and other duties, payable out of them, are at this day paid to the collector of the diocess of Dunkeld; *5thly*, In the old chartulary of Aberbrothock is a list of the parishes in the bishoprick of St Andrew's, in which none of these are contained; *6thly*, In Bagimont's roll these parishes are taxed as in that diocess, and in Habakkuk Bisset's collections, where this roll is inserted, it is said, p. 2180. 'The bishoprick of Dunkeld is divided ' from the Bishop's seat thereof, the five kirks as follows, *viz.* in West Lothian, Abercorn; in East Lothian, Aberlady; and, in the Merse, Bunkle

‘ and Preston, whose Commissary was lately Mr Patrick Lindsay, did use some-
 ‘ times to sit in Edinburgh, by dispensation from the Lords of Session, or o-
 ‘ therwise at any of the said kirks, as he pleased, for administration of justice,
 ‘ with his own clerk, by reason of the spaciousness of the said diocess of Dun-
 ‘ keld;’ Cramond is here omitted, but it is plainly intended, as five kirks are
 spoken of; *7thly*, Decreet of valuation 1634, of the teinds of lands in the pa-
 rish of Abercorn, bearing it to be in the diocess of Dunkeld; *8thly*, A sub-
 stitution 1641, by the Commissary of Dunkeld, constituting a Commissary-
 depute over these five parishes, with letters of publication thereof under the
 signet; *9thly*, Discharge 1660, by the Commissary of Dunkeld to his substi-
 tute; and 1661, letters of publication, at the instance of the said substitute, of
 his substitution; *10thly*, In 1665, a stop was put to the publication of banns
 of two parishioners of Cramond, upon a promise of marriage claimed against
 the man, until the cause should be tried; which was done before the Com-
 missary of Dunkeld; *11thly*, In 1666, charge at the instance of the Bishop of
 Dunkeld, and his Procurator-fiscal, against the hail Ministers of the diocess be-
 south Forth, to give in lists of the persons dying yearly within their parishes,
 in order to confirmation; *12thly*, In a prorogation of Lord Gosford’s tack of
 his teinds 1678, the parish of Aberlady is described in this diocess; *13thly*, In
 1678, a dispute about a seat between two heritors of Cramond was decided
 by the Bishop and Synod of Dunkeld; *14thly*, There have been Commissary-
 deputies of Dunkeld continued from the substitutions mentioned, down to the
 present time, who have exercised the jurisdiction, as appears by their acts
 and warrants produced.

For the Commissaries of Edinburgh; There is no proof these parishes lay
 within the diocess of Dunkeld, the charter first mentioned only tending to
 shew, that the lands were of the temporality of that benefice, notwithstanding
 whereof, they were subject to the inspection of the Bishop, within whose dio-
 cess they locally lay; and it is from this interest, of drawing part of his revenue
 out of them, that they are mentioned as belonging to the Bishop of Dunkeld,
 in Bagimont’s roll, and the Exchequer rentals: The substitutions only prove,
 that the Commissaries of Dunkeld entertained a notion of these parishes be-
 longing to them, and the deputies named had not any regular possession of the
 jurisdiction, never confirming testaments, except a few of no consequence,
 nor keeping any regular record, but holding now and then Courts, for form’s
 sake, marking the proceedings upon scraps of paper, and neglecting them;
 whereas, the Commissaries of Edinburgh possessed the jurisdiction, by con-
 firming the testaments of the people of greatest consideration, the Heritors
 and Ministers of the parishes, as appears by a list from 1568, and determina-
 tion of processes, whereof a list is given in, beginning 1696.

On the *second* point *pleaded*, and *observed* by the Court, for the Commissa-
 ries of Edinburgh, Supposing the diocess of Dunkeld to have extended over

No 279. these parishes, yet Queen Mary, 1563, erected a new jurisdiction of Commissaries, and gave them territories, without regard to the diocess; and, particularly, gave to the Commissaries of Edinburgh jurisdiction within the shires of Edinburgh, Haddington, Linlithgow, &c. within which the disputed parishes lie, which was confirmed by act of Parliament, 5th June 1592. Afterwards, the power of naming Commissaries was by King James VI. committed to the Lords of Session, with power of erecting commissariots, and settling their territories, some of which still subsist; and, as it cannot be denied, the whole territory of Edinburgh was taken out of some diocess or other, so might these parishes be taken out of Dunkeld.

For Dunkeld; This constitution did not continue; for, after the Ecclesiastical Government by Bishops was restored, there was, by act 6th, Parl: 1609, also restored to them the power of naming their Commissaries; reserving, indeed, to the Commissaries of Edinburgh that sovereign jurisdiction given them over the kingdom, but the jurisdiction of particular commissariots, returned to those named by the respective Bishops, as appears from this, that, by Queen Mary's grant, Peebles and part of Stirlingshire was comprehended, which do not now belong to them; and, in like manner, the Bishop of Dunkeld recovered his territory. Nor does it import, that the rest of the territory of Edinburgh belonged to the Archbishop of St Andrew's, and, by the same rule, should have reverted to him; for his neglect of his right ought not to prejudice Dunkeld; besides, the naming the Commissaries of Edinburgh was his, for, though the naming two of them was given to Glasgow, yet, in fact, St Andrew's named the whole; and it was needless to name a separate Commissary for the provincial jurisdiction from those that had the universal; and, indeed, St Andrew's his naming the whole for Edinburgh, might have arisen from its belonging to his diocess.

For Edinburgh, The act, giving the Bishops the nomination of the Commissaries in their diocesses, was without prejudice of the commissariot erected at Edinburgh; nor could these Judges, retaining the particular jurisdiction within their bounds, be explained by their being named by St Andrew's, as their authority never extended over his whole diocess, but was limited by the original grant.

THE LORDS, 21st July, "Found, that the Commissaries of Edinburgh had the sole right of exercising the jurisdiction of commissariot over the parishes of Abercorn, Cramond, and Aberlady."

On bill and answers, they adhered.

Reporter, *Armiter.*

For the Commissaries of Edinburgh, *Ipsi.*
Clerk, *Kirkpatrick.*

Alt. *W. Grant.*

D. Falconer, v. I. No. 223. p. 307.