

\* \* Durie reports this case :

In a suspension betwixt Liddel and Robbs, whereby a decret was desired to be suspended, which was transferred before the Commissary of Aberdeen, the principal decret being recovered before the provost and Baillies of Aberdeen ; in the which suspension, the Lords found the reason thereof relevant, and the decret of transferring foresaid, given by the Commissary of Aberdeen, to be null, because the Lords found that the Commissary's power and jurisdiction extended not to transfer the decret and sentence obtained before any other Judge ; likewise they found, that no inferior Judge had power to transfer the decret given and pronounced in another inferior Judge's Court ; for albeit a Judge might transfer the sentence, in some cases, given in his own Court, yet he had not that power, in sentences pronounced in other Courts, but such transferrings ought to be sought in the sovereign Courts, to which the other judicatories were subaltern. And this was found, albeit the decret of transferring was desired to be maintained, as properly belonging to the jurisdiction of the Commissary, and as being a consistorial matter, because the decret was transferred active, only in the executors of the defunct, obtainer of the sentence, and so pertaining to the executors, therefore the commissary was Judge ; which was repelled.

Act. Mowat.

Alt. Nicolson, younger.

Clerk, Gibson.

Durie, p. 124.

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1626. March 22. Mr. PATRICK COLLACE against The LAIRD of ELPHINSTON.

No. 4.  
Transference  
of a decree of  
comprising.

Mr. Patrick Collace, assignee constituted by William Henderson, and general heir served and retoured to John Henderson, burges of Haddington, in and to a decret of comprising deduced at the said John's instance, against umquhile Mr. Robert Johnston, charged the Laird of Elphinston as superior to infest him. He suspended, alleging the decret should be transferred in Mr. Patrick *active*, and against the heir or apparent heir of Mr. Robert and the Laird of Elphinston as superior *passive*, because umquhile John Henderson, at whose instance the comprising was deduced, was dead ; and also Mr. Robert against whom it was led, and that long before this assignation ; and so till it were transferred no process (it being of the nature of other decreets) till infestment follow thereupon ; for if Mr. Robert had given a bond to the said John for infesting of him in his lands, and John had registrated the same, and charged for implementing thereof, and thereafter deceased, William his heir could have no action thereupon till first he had transferred the same in himself *active* ; *multo magis* where they are both dead. The Lords sustained the charge against the superior.

Spottiswood, p. 340.