

1627. *March 27.* IRVINE <sup>vs</sup> against YOUNG.

IN a suspension betwixt Irvine and Young, of a decret before the Commissary of Dunkeld, against the suspender, as lawfully charged to enter heir to his father, who was decerned by a decret-arbitral to do certain deeds to the charger; and the decret being suspended, because it was given against the defender, as lawfully charged to enter heir to his father, which was not proper to the jurisdiction of a commissary, to cognosce upon and proceed against any person *hoc nomine*, as heir, or charged to enter heir to his predecessors, and so the decret was null as *a non suo judice*; this reason was not sustained, but the decret of the Commissary was allowed, because the defender's father, to whom he was charged to enter heir, and against whom the sentence was given *eo nomine*, consented to the registration of the decret-arbitral in that Commissary's books; and so as he could not oppone himself against the Commissary's jurisdiction thereanent, no more could the suspender, who was convened, as representing him by the foresaid charge to enter heir.

Act. *Nairn.*Alt. *Burnet*, Major.Clerk, *Hay.**Fol. Dic. v. 1. p. 494. Durie, p. 295.*1668. *June 25.*BLACK *against* SCOT.

ALEXANDER BLACK having obtained a decret before the Commissary of St Andrew's, against James Scot, for L. 126, pursues a transference thereof against the Representatives of James Scot, who *alleged* absolvitor, because the decret is *ipso jure* null, being given by a Commissary, in a matter not consistorial far above the quantity allowed by the injunctions; and there being nothing to instruct, but the defenders being holden as confessed, the decret at least must be turned to a libel, and yet proved; *2do*, If the defunct had been obliged to have compeared, he would not only have denied the receipt of the vinegar and grapes libelled, but he would have offered to prove, and the defender offers yet to prove, that they were refused, and lay publicly upon the shore where they were disloaded; *3tio*, It was offered to be proved, the defunct was lying on death-bed, the time he was cited to depone, and was holden as confessed. The pursuer *answered*, That albeit these reasons were relevant to repone a party holden as confessed to their oath, yet were not sufficient to annul the decret, seeing the pursuer lost his probation, the receipt of the goods having been two years ago; and albeit this sum exceeded the Commissary's injunctions, yet the violation thereof does not annul his sentence, or take away his power, unless the same had been objected upon compearance.

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No 25.

A consent to register in a Commissary's Court books, is understood a prorogation of the Commissaries' jurisdiction as to all actions upon the deed so registered. The contrary was decided, Greenock against —, No 24. p. 7308. *supra.*

No 26.

Though a Commissary decern in a sum exceeding the injunctions given to the Commissaries, yet the sentence is valid, unless it had been objected to upon compearance. Here the decree was in absence.

**No 26.** THE LORDS found not the defences relevant to annul the decret, or to hazard the loss of the pursuer's probation; but seeing the defender burdened himself with a contrary probation, the LORDS inclined to admit the same, if it were sufficiently pregnant; and therefore ordained the pursuer, before answer, to adduce witnesses, that the goods were never taken off the shore, but boated there.

*Fol. Dic. v. 1. p. 494. Stair, v. 1. p. 543.*

\*.\*.\* Gosford reports this case.:

ALEXANDER BLACK having obtained a decret before the Commissary of St Andrew's, against the deceased James Scot, for L. 168 Scots, as the price of a parcel of vinegar, wherein the defunct was holden as confessed, there was a transferring of the said decret pursued against the defunct's heir; who *alleged*, That the decret was null, being given by the Commissary, who was not a competent judge; and the defender's father being dead since the decret, and being only holden as confessed for non-compearance, when he was upon death-bed, the pursuer ought yet to pursue for the said debt, and prove as he would be saved. This allegeance was repelled, and the decret sustained, seeing by the death of the defender, that manner of probation would fail. But if the defender could propone any relevant defence against the debt, the LORDS did allow him *in hac instantia* to propone the same specially, the Commissaries being in use to judge of civil matters of small importance, where the libel is referred to the parties' oaths.

*Gosford, MS. No. 7. p. 3.*

1748. December 17. SHERIFF-CLERKS *against* COMMISSARIES.

**No 27.**  
Found, that the Commissaries have no power to pronounce decrees in absence for any sum above L. 40 Scots.

BETWIXT the Sheriff-clerks and Commissaries it was debated, whether decrees in absence pronounced by the latter for sums above L. 40 Scots are effectual in law, or whether they are to be considered as simply void. The Sheriff-clerks founded upon the instructions 1563 and 1666, limiting the jurisdiction of the Commissaries with regard to actions of debt and other causes referred to oath, to the sum of L. 40 Scots. In answer to this, the Commissaries opponed the same instructions, declaring their Court competent to all actions where the parties submit themselves to their jurisdiction; whence they argued, that they must have a radical jurisdiction in matters above L. 40 Scots; because, by the law of Scotland, private consent cannot create a jurisdiction. From these premises they inferred, that a decree in absence must be good, even where the sum is above L. 40 Scots, and that the meaning of the instructions must be not to render void such a decret, but only to bestow upon the lieges a privilege of declining the jurisdiction, if they thought proper.