

No 201. before that same Judge before whom the principal cause was intended, unless those that did represent him did not live within that jurisdiction, and were *alterius fori*; in which case, the Lords of Session were the only competent Judges.

Fol. Dic. v. 1. p. 501. Gosford, MS. No 667. p. 393.

No 202. 1677. January 26. PROCURATOR-FISCAL of GLASGOW *against* COWAN.

THE Commissary of Glasgow, having sustained process at the instance of the Procurator-fiscal, for the trial of a falsehood of executions, whereupon a decret had proceeded; and having, upon probation of the falsehood, decerned the user of the said executions to pay L. 300 to the Procurator-fiscal, as a fine; and the said decret being suspended; the LORDS found, that the Commissary was not a competent Judge to the improbation of executions, by way of action, seeing they cannot reduce their own decreets; and improbation is a reduction *ex capite falsi*.

Reporter, *Justice Clerk*.

Clerk, *Hay*.

It is to be considered, that the most part of decreets before inferior Judges are for null defence, and upon false executions; and it were hard, that there should be no remedy but by improbations before the Lords, which may depend long, and are very chargeable; so that decreets before inferior Judges being, for the most part, for inconsiderable sums, the remedy should be worse than the mischief.

It appears, indeed, that the Commissaries have not power to fine; that being a criminal jurisdiction; and that they are not Judges to improbation by the indirect manner; the trial of falsehood, by circumstances and presumptions, being *altioris indaginis*; and of that difficulty, that it ought not to be left to an inferior Judge. *Item*, The trial of falsehood, as to that effect, that falsaries may be punished, ought not to be by any inferior Judge: But it seems to be just and necessary, that parties, grieved by such decreets, should be allowed to pursue the obtainers of the same, to hear and see them reponed against the said decreets, upon that ground, that they were not cited to the same; to be proved by the witnesses and executor himself, declaring that they pursue to that effect allenaryly: And it appears not to be inconsistent with law and form, that this course should be taken; seeing the Judge does not reduce his own decret, *ex capite iniquitatis*; and it may be provided, that such pursuits, though they be upon the matter improbations, are only to the effect foresaid; and that no other effect or consequence shall follow upon the same; and *multa fiunt per indirectum*, which cannot be directly; and if a party, who is holden as confessed, should raise a libel before an inferior judge that it may be found that he was not *contumax*, being out of the country, or

sick, or detained by storm, or some other insuperable impediment; and that, therefore, he should be reponed; and the decret should be holden as a libel; such a pursuit would not be incompetent, though, in effect, it would be a reduction upon the matter.

No 202.

Fol. Dic. v. 1. p. 501. Dirleton, No. 444. p. 216.

* * * Stair reports this case :

WILLIAM COWAN having obtained a decret against Mackclarie, before the Commissary of Glasgow, there was thereafter a pursuit at the instance of the procurator fiscal against the said William, as having made use of false executions, whereupon the decret proceeded; who having compeared, and the executor and witnesses in the execution being examined, the same were improven, and thereupon the Commissary reduced the decret, and decerned Cowan to pay L. 300. Of this decret Cowan raises suspension and reduction on these reasons; *imo*, That though the commissary might have questioned, or fined his own officer, yet he, nor no inferior judge, was competent to an improbation, except *incidenter* during the dependence of any process before them; but after sentence they cannot improve any writ, nor can they reduce their own decreets; for the Commissaries of Edinburgh only can reduce the decreets of inferior Commissaries, but even the Commissaries of Edinburgh cannot reduce their own decret, though they be a collegiate court; *2do*, They had far less power to fine Cowan for making use of the execution and decret; neither is there any thing adduced to prove that Cowan knew that the executions were false, who did protest at the time of the sentence, upon that account, to be free.—It was *answered* to the *first*, That Cowan having compeared in the decret in question, and not declined, he acknowleged the jurisdiction. To the *second*, the probation was of no principal writs, but of executions, and upon a general complaint against that commissariat.

THE LORDS found the first reason relevant, that the Commissary could not after sentence improve the executions, or reduce his own decret; but found that reason elided, by Cowan's compearing and not declining; and found the second reason relevant, that albeit Cowan did bide by the executions, yet nothing being proved of his accession to the executions, not being truly done as they did bear, the LORDS suspended the last decret.

Stair, v. 2. p. 499.

* * * This case is also reported by Gosford :

IN a suspension and reduction of a decret obtained before the Commissariat of Glasgow, at the instance of William Cowan, whereby not only they had reduced their own decret, but likewise in an action of improbation against the said Cowan, they had found him guilty of falsehood in contravening and em-

No 202.

ploying of messengers who had made up false executions, and whereof he had made use, by producing them in judgment, and thereupon had condemned him in the sum of L. 300 upon these reasons; *1mo*, That the Commissaries of Glasgow were not judges in reductions of their own decreets pronounced by them, that being only competent to the Commissaries of Edinburgh; nor any other Commissaries have power to reduce the same, they being *functi officii* by giving their decreet; *2do*, The decreet of improbation upon a reason of falsehood of executions, was only competent to the Lords of Session, as being Supreme Judges of the land in all improbations, especially by way of action where falsehood is to be tried by the direct or indirect manner.—It was *answered* for the procurator fiscal, That the executions produced by the messengers being in judgment before them, they were most competent judges to try the falsehood; and it were most inconvenient, where the paper can be declared false, upon the direct manner, that they should not have that power, seeing the trial was most proper, and being easily tried by examination of the witnesses, if they were present, or did subscribe; and the like was decided upon the last November 1630, Williamson against Cushnie, No 197. p. 7483. *2do*, If all judges, before whom executions are produced and by way of exception are challenged as false, are competent, so upon that reason, they are competent judges by way of action, *quia cui competit exceptio multo magis et actio*; and as to that privilege, the Commissaries have a special right in their injunctions ordaining them not only to stop process upon proponing of improbations; and therefore of necessity must be allowed, after sentence, to try the same by way of action, otherwise he would be altogether secluded; whereas the contrivance of falsehood being most frequent before inferior judges, the lieges would be heavily prejudged if mean persons could only be remedied by a longsome and expensive process before the Lords of Session, which could only come in by the roll *in presentia*. *3tio*, The pursuer could never question the decreet, because he had compeared judicially and abidden by the executions which were improven by one of the witnesses, who denied he was present, and the other confest that he had only subscribed the same after the execution was made by the messenger.—THE LORDS did much debate amongst themselves anent the relevancy of the first reason, if the Commissaries could reduce their own decreet, and did all agree, that they being *functi officio* by the decreet, no Commissaries could reduce the same, it being only proper to the Lords of Session; and that inferior judges, if they found that their officers employed did malverse, they might punish them summarily; but as to the parties who employed them, and thereupon had received sentence in their favour, the same could not be taken away by that same judge who had given sentence in an inferior court, or any other, such as the Commissariat of Edinburgh, or Court of Admiralty. As to the *second* point, having considered that the trial by way of action of a falsehood of an execution before an inferior court, both against the party and the executors, if it were clear and without all question, that it were hard to bring it in by the ordinary roll in a new process

and improbation before them, especially in this case, where the accession of the party who employed the messenger was not so pregnant, if *bona fide* he had made use thereof as being ignorant of the falsehood; they did remit it to some of their own number who were upon the Criminal Court to consider the same, as upon their judgment such a trial might be taken as they might find just and reasonable.

No 202.

Gosford, MS. No 947. p. 625.

1725. February 11.

JOHN GREIG, Journeyman Wright in Edinburgh, *against* The MAGISTRATES of Haddington.

JOHN GREIG being fined by the Magistrates of Haddington for an irregular marriage with Elizabeth Calderwood a burghess of that burgh, he raised reduction of the decreet, and concluded repetition of the fine and damages, with expenses, upon the following grounds; *1mo*, That he was not subject to their jurisdiction, and was only accidentally at Haddington visiting his wife's relations; *2do*, That they repelled a just defence of *res judicata*, he having been fined by the Justices of Peace of Mid-Lothian; and upon both these grounds he contended, that they had committed iniquity, and were guilty of manifest injustice and oppression.

No 203.

Damages and a penalty were claimed for an irregular judgment of an inferior judge. The decree was reduced, but not even expenses were allowed to the pursuer.

It was *pleaded* for the Magistrates, That though the decreets of inferior judges may be reduced, yet it was unprecedented to make such judges liable in penalties for any mistakes which they might have committed in pronouncing their sentences; but particularly, the defences pleaded were justly over ruled: For, as to the *first*, the crime was inchoat in Haddington, from whence Greig had seduced and carried off the said Calderwood. And further it was *pleaded*, That *ubi res invenitur* is a *forum* in crimes; and by the act 1695, cap. 12. all ordinary judges have a power of cognoscing, if they can cite or apprehend the party; for it provides, That action and execution shall pass, either at the instance of the parties concerned, or of the procurator fiscals of the jurisdiction where they shall happen to be questioned.

To the *second* defence it was *answered*, That the Justices of Peace had no power to fine for irregular marriages, for no such power was contained in their original instructions, nor lodged in them by any subsequent law; and they were not a court which had an ordinary jurisdiction; but were only commissioners appointed for certain purposes, which appeared plain from the acts 1617, cap. 8: 1661, cap. 38. and the act 1685, cap. 16. was repealed by the 23th act 1690: And besides, by the 8th act 1617, 'the Justices were not to proceed to cite parties, till 15 days after committing the facts for which they were convicted, and 'that the ordinary Magistrates had neglected to exercise their right all that time.' And in the present case, the Magistrates pronounced sentence within the 15 days.