

of their cognisance and jurisdiction, who, by their instructions, are tied up to L. 40, as has been oft decided, 23th November 1621, Lord Lindsay *contra* Ayton, No 286. p. 7575.; 6th February 1624, Gordon *contra* M'Heugh, No 284. p. 7573., observed both by Haddington and Dury; and 19th July 1625 Ker *contra* Ker, (See APPENDIX)., where the Commissaries' decreets were annulled when they exceeded the foresaid boundaries; and lately, on the 1st of July 1696, Paterson against Ross and Urquhart, No 292. p. 7579., the LORDS annulled decreets of adjudication, because they proceeded on decreets of constitution obtained before the Commissary of Ross for considerable sums, to which he was not judge competent, and his jurisdiction was not prorogated by the parties. *Answered* for Kilmarnock and the other creditors-arresters, That all of them dwelt within the Commissary of Glasgow's jurisdiction, both the debtors and the arresters, and the persons in whose hands the arrestments were laid; and to quarrel such diligences, may lay a preparative to subvert most of the diligences in the nation, seeing the instructions are plainly in desuetude, and the Commissaries judge promiscuously in any sums brought before them; likeas, their jurisdiction is sufficiently homologated and prorogated by the clause of registration, which bears any judges' books competent; and it is the advantage of the lieges to have their election whom to go to, by which they are served both cheaper and readier; and as to the decision, Paterson against Ross, it was in a competition of real and heritable rights to which Commissaries are not judges; but this is in the case of arresters, where the diligence is personal, and the subject moveable. THE LORDS thought the clause of registration gave neither warrant nor consent, unless it had *per expressum* bore the Commissaries' books; but in respect of the general custom, and the danger of many rights, they, by a scrimp plurality, sustained the arrestment laid on by the Commissary's precept, though it was beyond the bounds of that capacity to which he is restricted by the old laws. Yet this cannot hold in all cases; for what if he had registered his bond in the Admiral's books, and taken out his precept of arrestment, it would have been certainly null; for *jus dicenti extra territorium impune non paretur*; but the general custom of the Commissaries judging in such matters over-ruled this case.

On a bill given in for Sir George, the LORDS rescinded this interlocutor, and found the diligence on the Commissary's precept for arresting null.

Fol. Dic. v. 1. p. 510. Fountainball, v. 2. p. 178.

1705. June 23.

JOHN MATTHIE, Skipper in Prestonpans, *against* The COMMISSARY-CLERK of Edinburgh.

THE said John Matthie having caused register a bond due to him in the Commissary-books of Edinburgh, and having afterwards occasion to raise an

No 392.
diligence could proceed. The Lords, tho' it was customary to register bonds in the Commissary-court books, found the arrestment null.

No 393.

No 393. adjudication for the debt, which could not be done effectually upon an extract out of these books; and the Commissary-clerk having refused to restore the principal upon getting back the extract, because the bond was booked, application was made to the Lords of Session by a bill for a warrant to the said Commissary-clerk, or his deputes, to give up the principal bond to be registered in the session-books, in order to found a legal diligence for making the debt effectual.

THE LORDS granted the desire of the petition.

Fol. Dic. v. 1. p. 510. Forbes, p. 10.

1706. *January 15.*

The BOX-MASTERS to the Incorporation of the Seamen of Prestonpans, Supplicants.

No 394.

A bond registered in the Commissary-court books for a sum exceeding L. 40 Scots, not allowed to be taken out from among the warrants, in order to be registered in another court, that diligence might proceed upon it, from which it is to be inferred that it had been competently registered.

THE said Box-masters having presented a petition to the Lords, shewing, that there being a bond granted to the said Incorporation registered in the Commissary-court books of Edinburgh, and there being now occasion to lead adjudication thereupon, they desired warrant to the Commissary-clerk to deliver up the principal bond, in respect the registration in the Commissary-court books may be judged null, as an incompetent judicature; and the petition being appointed to be intimated to all parties having interest;

It was *answered*, That the nullity pointed at in the petition is founded on an article in the instructions to the Commissaries, recorded in the books of sederunt in *anno* 1666, Art. 1st, which enumerates the actions proper to be pursued before the Commissaries, and then adds a generality in these words; "And in all other matters wherein oath of party is required, if the same does not exceed L. 40 Scots." From which an inference in many cases hath been drawn, as if the Commissaries were not proper judges in matters of greater importance; and this petition proceeds yet further to infer an incompetency also in decreets of registration proceeding on consent, for which there is no ground; for *imo*, By the 19th act, Parl. 23. James VI. regulating the prices of several courts, the prices payable to the Commissary-clerks for registering all contracts, obligations, and sicklike evidents, are particularly expressed, so much if they do not exceed one sheet of paper, and so much more if they do; which clears that registration of all contracts and other obligations were allowed, and so it hath been the practice ever since. *2do*, Horning passed on Commissaries' decreets, and upon registrations there uniformly in all time by-past. *3tio*, The 38th act, Parl. 1685, concerning registration of writs in the books of Session, provides, that no clerk of an inferior court for the future presume to register any writs in his books, either for conservation or for execution, against any party who dwells without his jurisdiction; which implies, that