

No 281. Commissaries books is limited to the case where the same is expressly consented to; but then the reason of that was now thought to be no other than this, That at that time registration was competent in the books of no court whatever, even of Session, unless specially consented to; and therefore that limitation in these instructions was properly no limitation as to the Commissaries, but only expressive of the necessary requisite to every registration; and accordingly, when that was afterwards altered, which happened about the year 1654 (and with reason, because, by a person's changing his residence from one jurisdiction to another, his consent to registration in the books of the jurisdiction where he lived for the time, became ineffectual; and therefore, in place of a special consent, the general consent now in use to register in any court books competent was introduced;) the instructions given to the Commissaries after that period in 1666, with respect to registrations, are general, without any such limitation as was in the old instructions; so that the question came to this, What was meant by Judges books competent? Which, for the Sheriff-clerks was *pleaded*, To mean competent for judging of the cause, which was the subject of the bond or contract; and if that was the meaning, then, as to the Commissaries, it was limited to sums not exceeding L. 40 Scots. But the Lords understood it to mean books, in which it was competent for parties to have consented to registration; and in support of this construction, the practice, as *optimus verborum interpres*, and which was proved by a large condescence of instances given in by the Commissaries of registration in their books, in every year, upon the general clause of registration after it came in use, had no small weight.

There was, however, one thing thrown out from the Bench, as an objection to this resolution of the Court, viz. that it would make the Commissaries competent in actions upon all deeds whatever bearing a clause of registration; for that so much the instructions 1563 bear, that they be competent in all actions upon deeds bearing a consent to registration in their books, and agreeably whereto, it was decided, March 27. 1627, Irvine *contra* Young, No 25. p. 7309.; which got no other answer, but that it was not law, and that the instructions could not make it law; and so far is true, that the contrary appears to have been decided, November 28. 1621, L. Greenock *contra* \_\_\_\_\_, No 24. p. 7308.

*Kilkerran*, (JURISDICTION OF THE COMMISSARIES.) No 3. p. 302.

No 282. 1780. August 11.

ROBERTSON *against* PRESTON, &c.

THE Minister and Kirk-session of Cupar having refused to admit a person to the sacrament, on account of alleged immorality; an action of defamation, on this account, at the instance of the person aggrieved, was found not compe-

tent before the Commissaries, as the defenders being an ecclesiastical court, were not subordinate to any civil one. No 282.

*Fol. Dic. v. 3. p. 354. Fac. Coll.*

\* \* \* This case is No 85. p. 7465.

### S E C T. III

Commissaries are limited that they cannot Judge in causes above a certain sum.

1605. *May 29.* M'LELLAN *against* M'LELLAN.

IN an action betwixt M'Lellan and M'Lellan, brothers, the LORDS found a decret given by the Commissary of Kirkcudbright, decerning the other three hundred three score merks, as the price of a horse, which the pursuer had referred to the defender's oath of verity, and in respect of his non-compearance the judge had referred to the pursuer's oath, to be null, by way of suspension, because the Commissaries had no power to proceed in any civil cause exceeding forty pounds by their injunctions, and therefore found the said Commissaries decret null.

*Fol. Dic. v. 1. p. 505. Haddington, MS. No 777.*

No 283.  
A Commissary's decret, given in a civil cause, exceeding L. 40 Scots, was found null by exception, as being beyond the instructions.

1624. *February 6.* GORDON *against* M'HEUGH.

IN an action betwixt Gordon *contra* M'Heugh, the LORDS found a decret given by the Commissary of Wigton, decerning a party to pay the prices of certain victual, which he was obliged to deliver to the pursuer of that cause, to be null, by way of objection in the suspension then discussing betwixt the parties, because the same was in a matter civil, viz. for prices of victual, which was not proper to an ecclesiastic jurisdiction; and that it was supplied by alleging, that albeit, of its own nature, it was civil, yet seeing it was referred to the defender's oath, in that respect the Commissary was a judge competent. THE LORDS, nevertheless that it was referred to the defender's oath, found it null, because the decret was for a greater sum than whereon the Commissary could decern, the matter being civil, to wit, extending to 120 merks; for the LORDS found, that the Commissaries, in matters which were not ecclesiastic,

No 284.  
Commissaries, in matters secular, cannot be judges to admit probation, other than by the defender's oath, except the value of the cause exceed not L. 40, Scots. If the matter be not ecclesiastical, and exceed L. 40, they