

No 284.
 may judge in
 it, referring
 to the defen-
 der's oath,
 but the sub-
 ject must
 not exceed
 100 merks.
 If it exceed
 that sum, and
 be secular,
 the Commis-
 saries are not
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 red to oath.

could not be judges to admit any probation, but the defender's oath, except in matters which exceeded not the value of L. 40, within the which quantity they might receive probation by witnesses, and otherways, albeit the subject was not in a matter ecclesiastic; and if the matter were not ecclesiastic, and exceeded L. 40, they might also be judges thereto, the same being referred to the defender's oath, if the subject exceeded not 100 merks; but if it exceeded 100 merks, and was civil, albeit referred to oath, the Commissaries were not judges thereto; for if they were admitted to judge upon civil matters exceeding 100 merks, they might, upon pretext of referring of matters to the defenders oaths, draw all actions in before them which were absurd.

In this same above-written process, the LORDS found the Commissaries decret null, because it was given in time of the harvest vacance, and the decret bore not that it was given by virtue of a dispensation; and the LORDS would not sustain the answer made by the party, whereby he alleged, that the Commis- sary had dispensation, seeing they found that the decret ought to have made mention and proported the same, and so not bearing the dispensation, being given in August, was found null for that cause.

Act. Belshers.

Alt. Cunninghame.

Fol. Dic. v. 1. p. 505. Durie, p. 107.

* * Haddington reports this case :

IN an action betwixt Gordon of Tanister and M'Culloch, the LORDS found, that the Commissaries might not keep courts in vacance without the Lords dis- pensation; and if they sat by dispensation, their decreets given by that warrant should bear the same. It was farther found, that the Commissaries of Edin- burgh might not be judges in a civil cause of debt, upon pretext that the pursuer referred the summons to the defender's oath, if the sum exceeded an hundred merks; because, by that colour, all actions of debt might be drawn before them from other judges; and therefore the Lords found the decret given by the Commissary of Kirkcudbright, for six bolls of bear at L. 20 the boll, null.

Haddington, MS. No 2993.

No 285.
 A decree of a
 Commissary
 for more than
 L. 100, was
 sustained,
 because it
 was for a
 legacy.

1626. July 12:

TURNBULL *against* MATHISON.

IN a suspension raised by Turnbull against Mathison, of a decret obtained before the Commissaries of ———, for payment of L. 200, which was quar- relled in that suspension, because it exceeded L. 100, and so not subject to the Commissaries' jurisdiction; the decret was sustained, because the sum was

acclaimed and decerned in his favours, to whom the same was left in legacy ; and so the Commissaries might judge thereon. In this same process, the Lords also sustained the decret given against one of the two executors of the defunct, albeit the other was not called, seeing the executor called, against whom decret was given, was sole intromitter, at least had intromitted with more than the sum contained in the decret extended to, and had not made payment to any other, neither was distressed by any other of the defunct's creditors. The like was decided before, as is marked, 23d July 1625, betwixt Mr Peter Hewat and Aitkin, No 71. p. 3878. ; but the reason specially respected, and moving the Lords in this decision, was in respect of the decret standing, which could not be taken away in this suspension so summarily. See SOLIDUM ET PRO RATA.

Act. Craig.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. 1. p. 506. Durie, p. 212.

1628. January 18. LO. LINDSAY against LA. AYTON.

No 286.

IN a suspension betwixt the Lo. Lindsay and the Lady Ayton, of a decret obtained before the Commissaries of St Andrews, for a house-mail in Cupar, pertaining to the Lo. Lindsay, possess by her ; the LORDS rejected that reason of suspension, bearing, that the sum decerned was an hundred and twenty pounds, and so out with the bounds of his proceeding, being a civil matter, viz. for house mails, albeit referred to the parties oath, seeing he could not judge by oath, where the matter exceeded forty pounds. ; notwithstanding whereof the decret was sustained, being for three terms of an house-mail, and so each term being forty pounds, the matter behoved to be respected as three several heads, and so in effect *totidem libelli*, albeit all were contained in one pursuit ; in this process, the LORDS found, conform to the custom observed, that the Commissaries of Edinburgh, in civil matters, which are referred to parties' oaths, cannot judge in matters where the same exceeds an hundred merks, and the other inferior Commissaries where the same exceeds forty pounds ; and that their decreets are null if they contain any more in civil matters, albeit referred to the parties oath.

Act. Stuart.

Alt. Ayton.

Clerk, Gibson.

Fol. Dic. v. 1. p. 506. Durie, p. 328.

. Spottiswood reports this case :

THERE was a decret obtained by my Lord Lindsay against the Lady Ayton before the Commissaries of St Andrews, for payment to him of L. 120, for three terms mail of a house in Cupar set to her. *Alleged*, That this being a