

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

all ordinary judicatures may register for execution against parties within the jurisdiction. *4to*, The same instructions, Art. 25th, clearly and plainly suppose, that all writs may be registered in Commissary-court books, because it provides, that the dues of registration of all tacks, contracts, obligations, and other writs whatsoever, shall be divided in manner expressed in that article. And, *lastly*, if, in this case, the Lords should allow the principal bond to be taken out of the register, all the lieges whose diligence proceeds on the like registration would be rendered unsecure, which would be of greater inconvenience than can be well foreseen.

“ THE LORDS found no necessity of taking up the principal bond out of the warrants of the Commissary’s register, and therefore refused the desire of the bill.”

Fol. Dic. v. 1. p. 510. Dalrymple, No 70. p. 89.

* * * Fountainhall reports this case.

1706. *January 16.*—YOUNG and Man, seamen in Prestonpans, gave in a petition, representing, That they had by mistake registered a bond granted to them by Pedan and Melvil for 500 merks, in the Commissary-court books of Edinburgh, and were resolving to lead an adjudication thereon, and fearing it might not be legally founded, as a null registration, on the head of incompetency; therefore craved warrant to the Commissary-clerk, to give up their principal bond, on his taking back the extract, that they might register it in the books of Session, that the diligence thereon may be unquestionable. THE LORDS considered, that processes intended before the Commissaries, and decreets following thereupon, have been quarrelled as *ultra vires*, and above the L. 40 Scots mentioned in the instructions given to the Commissaries in 1666, inserted in the books of sederunt; and that in a competition betwixt two adjudications, a posterior was preferred to a former, because it proceeded on a decret obtained before the Commissary of Inverness; and lately in the case betwixt Sir George Weir of Blackwood and Cochran of Kilmarnock, *supra*, the Lords rejected an arrestment laid on by a Commissary’s precept; but for registrations in their books, being decreets of consent, they have not been quarrelled as incompetent; but, on the contrary, are warranted by the 181st act, Parl. 1593, and by the 7th act 1612, all execution is allowed to pass on Commissaries’ decreets, as upon Sheriffs’ or other inferior judges’; and the 38th act 1685, discharging registrations in books without the district and jurisdiction where the party dwells, does not insinuate any thing against the competency of the Commissaries for registration of any writs whatsoever, of parties dwelling within their bounds. THE LORDS, on these grounds, refused the desire of the petition, and thought the Commissaries might register such writs.

Fountainhall, v. 2. p. 312.

No 394.

. Forbes also reports this case.

ALEXANDER YOUNG and James Man, seamen, and present box-masters to the incorporation of seamen in Prestonpans, gave in a petition, craving a warrant to get up from the Commissary-clerk of Edinburgh, a principal bond, that through mistake had been incompetently registered in the Commissary books there, upon restoring the extract, in order to register in the books of Session, that unquestionable diligence might be used thereon. The desire of which petition, the Lords refused; because, albeit decreets in matters not consistorial before the Commissaries have been quarrelled as contrary to the instructions 1666, in a competition betwixt two adjudications, a posterior was preferred to a former, proceeding upon a decret obtained before the Commissary of Inverness; and lately, in the case betwixt Weir of Blackwood and Cochran of Kilmarnock, *supra*, an arrestment laid on by a commissary-precept was cast; yet registations in their books, which are decreets of consent, are not quarrellable; but on the contrary are warranted by the act 19th, Parl. 23. James VI, where the prices of their registration are taxed and set down; act 177th, Parl. 13th, act 7th, Parl. 21st, James VI., allowing execution to pass upon them; and the act 38th Parl. 1685, discharging registration without the jurisdiction where the party dwells, which insinuates nothing against the competency of the Commissaries for registration of writs against persons living within their bounds.

Forbes, p. 73.

1743. December 16. SHERIFF-CLERKS *against* COMMISSARIES of Edinburgh.

No 395.

IN a ranking of the creditors of Govan of Cameron, a diligence being objected to, as proceeding upon a bond registered in the Commissaries' books, which was said to be an incompetent court; the Lords found, That the Commissaries had no power to pronounce decrees in absence in causes purely civil for any sum above L. 40 Scots, but that they had a power of registering bonds, bills, contracts, and obligations, for whatever sums granted, and of authenticating tutorial and curatorial inventories, and an act of sederunt, of date 17th December 1748, was made to that effect.

Fol. Dic. v. 3. p. 363. Kilkerran. Rem. Dec.

. This case is No 27. p. 7310., and No 281. p. 7561.