1748. *June* 28. BLAIR *against* BLAIR.

No 280.

THE Commissaries may judge of idiotry, and allow a proof of it, to annul a marriage, in the same manner as they might of forgery, to set aside a testament, though not regular Judges of forgery; and a proof of idiotry being so led, without an inquest, the LORDS refused a bill of advocation.

Fol. Dic. v. 3. *p.* 354. *Kilkerran.*

*** This case is No. 11. p. 6293. *voce* IDIOTRY.

1748. *July* 19. SHERIFF-CLERKS *against* COMMISSARIES.

No 281.
The Commissary books are a competent register for bonds, bills, &c. without limitation of sums.

The Commissaries have a jurisdiction to authenticate tutorial inventories.

IN the ranking of Cameron's Creditors, *anno* 1737, it being *objected* against an adjudication, that it was null, as founded upon a bond above L. 40 Scots, recorded in the Commissary Court books; the LORDS found the Commissaries books not a competent register for bonds or bills above the sum of L. 40 Scots, unless where there is a consent of the parties to registrate in these books; and declared, they would make an act of Sederunt, to certiorate the lieges of the incompetency of such registrations. But the Commissaries being heard against this intended act, the matter lay over. Some of the Sheriff-clerks, encouraged by the foregoing proceedings of the Court, applied, July 1748, to have an act of Sederunt, as aforesaid. This produced a hearing in presence, in which it was clearly made out, that the Commissary books are a competent register for bonds, bills, *&c.* without limitation of sums. And the reasoning which brought over the Court to this opinion was as follows:

In this island, it was an early practice for Judges to interpose in intricate cases, by pressing an agreement betwixt the litigants; and we have instances of this practice in the Court of Session, not a few within a century. This practice brought about many agreements, which were always recorded in the Judges books. The record was complete evidence of the fact; and, if either party broke the concord or agreement, execution was issued by the Court against him, without necessity of any intermediate process. See *Glanvil, l.* 8. *c.* 1. 2. 3. *&c.* The singular advantages of a concord or agreement, thus finished in face of Court, were soon understood, and led men to make all their agreements, of any importance, in that manner; which, at the same time, was the more necessary, before the art of writing came to be common.

From this practice sprung the deed termed in England a bond in judgment, and with us a bond containing a clause of registration. When, by population, bargains were multiplied, it became cumbersome to have recourse to a Court,

No 281. for recording every private bargain; the art of writing becoming more common, a contrivance was fallen upon to put the agreement in writing, and to grant a mandate to a procurator to appear in judgment, in order to have the writ recorded, as the agreement of the parties; which was only done in case there was a necessity for legal execution. The writing, so recorded, was held to be full evidence of the agreement, sufficient to found a decree; and, in consequence of the decree, execution. The authority of the mandate was not called in question, being joined with the averment of the procurator; and from the nature of the thing, if faith be at all given to writ, the mind must at last rest somewhere without requiring farther evidence. For example, a bond is fortified by the subscription of the party, and the party's subscription by that of the witnesses; but the subscription of the witnesses must be relied on without further support, otherwise evidence must be required *in infinitum*. And, for the same reason, it is neither natural nor reasonable, that the procurator's mandate, being a relative deed, should require any further support than the subscription of the party.

The stile of this mandate came to be improved, and made to serve a double purpose; both to be an authority for recording the writ, as complete evidence of the private agreement, and also to be an authority to the procurator to confess judgment against the party, upon which a decree passes, of course, to be the foundation of execution. The mandate was originally contained in a separate writing, which is the practice of England to this day. In Scotland, the practice first crept in of indorsing it upon the bond, and afterward of engrossing it in the bond itself, which is our present form.

Before entering upon the question, what Courts are competent for recording private agreements, and for pronouncing decrees upon them, we must take a cursory view of the jurisdiction of the Ecclesiastical Courts, with regard to this matter. And it is admitted, that a consistorial Court, in place of which the Commissary Court came, had not originally any jurisdiction in civil causes. Custom, however, and statutes, have made Ecclesiastical Courts competent to many causes which are not strictly ecclesiastical, but of a mixed nature, if not purely civil. With regard to actions of debt, in particular, they had no radical jurisdiction; but as, by the old law of Scotland, as well as by the law of England, old and new, a defender was not bound to give evidence against himself; there was no remedy, when money was lent upon faith and promise, without writ or witness, but to apply to the Spiritual Court, complaining of breach of faith and promise. The party, though not bound to depone in a civil Court, was bound in the Spiritual Court, for removing the scandal, to declare the truth, as in the presence of God, which was in effect an oath. If he confessed, penance and restitution were enjoined; if he refused to answer, excommunication followed; and, in both cases, very rigorous execution issued against him.

Not only was the jurisdiction of the spiritual court established with regard to actions of debt referred to oath, but also with regard to all contracts that the party or parties had sworn to perform. This practice of interposing an oath for the greater security of performance, was once common; and we have traces of it so late as the act 19th Parl. 1681, discharging such oaths to be taken from minors. The *juramenti interpositio* was reckoned a sufficient foundation for the spiritual court to judge in all matters arising from deeds ratified upon oath. And with regard to this, as well as the preceding case, of a claim being referred to oath, the *Reg. Maj. l.* 3. *cap.* 7. is full evidence. No 281.

Thus it was that the spiritual court obtained a jurisdiction in all actions of debt referred to oath, and, by analogy, in all matters whatever where the proof was to be by oath of party; a necessary jurisdiction to supply the defect of the common law. And the consequence is evident, that it was a proper jurisdiction for recording of private agreements, and for registrating of bonds, &c. perhaps the most proper; for it would be absurd to deny that court the privilege of receiving the evidence of a bargain before-hand, by the acknowledgment of the parties, when it has the privilege of forcing an acknowledgement by oath, after process is raised for performance of the bargain. And, accordingly, we find from our oldest records, that the official and commissary courts were more frequented for registrations than any other inferior court whatever.

After the authority of the Roman law came to prevail, by which a defender is bound to depone against himself in civil causes, and can be held as confessed, it was thought convenient to limit the jurisdiction of the spiritual courts with regard to actions of debt, as less necessary than formerly. And, 1*mo*, As to the actions of widows, pupils, and poor persons, not exceeding the sum of L. 20 Scots, they are declared to have a necessary jurisdiction, the same that is competent to any other court. 2*do*, Their jurisdiction as to actions of debt, and other causes referred to oath, is limited to L. 40 Scots. But, 3*tio*, Their jurisdiction is preserved in its former extent with regard to all tranractions ratified upon oath, and in all causes where the parties submit themselves to their jurisdiction; of which last, more afterward. These particulars are all distinctly set forth in the instructions to the Commissaries 1563, and such remains their jurisdiction in *foro contentioso* to this day.

But as to the voluntary jurisdiction of this Court, particularly as to the recording contracts, and pronouncing decrees of registration, no alteration was made nor intended. By these instructions 1563, it is declared, "To be leisome to the Commissaries to cause their clerks register contracts, obligations, &c. in their books, which being registered, and their decreet of authority interponed thereto, the Lords of Council to give out letters in the four forms of poinding, for fulfilling the same, as was wont to be given upon persons who of before lay 40 days under cursing." And as these instructions, as well as Queen Mary's charter erecting the Commissary-court of Edinburgh, and be-

No 281. stowing upon it the same power of registration, are ratified by the 25th unprinted act, Parl. 1592, this branch of the jurisdiction is as well established as any jurisdiction can possibly be, supposing it even to be created by this act, and by the instructions; which at the same time is not the case, but barely a continuance of the jurisdiction that the spiritual court formerly possessed.

And as to the clause adjected both in the charter and instructions, "Providing that the contract, obligation, or other writing, in the body thereof before the registration of the same, bear, that they are content the same be registered in the said books," which the sheriff-clerks are willing to lay great stress upon; the argument drawn by them from this clause comes to be just nothing at all, when the practice at that time is known. At that period, the established practice was, to name in the bond every court where the bond might be registered in order to execution; the general clause of registering in all judges books competent not being known for near a century thereafter. At the time of these instructions, a bond could not be registered even in the books of Session, unless expressly consented to in the bond. It need be no surprise then, that the privilege of registering bonds was given to the Commissaries upon condition of a consent to register in their books, when no court whatever had that privilege except upon the same condition. In a word, it is plain, that this clause is not meant to be taxative, but merely descriptive of the common practice, by mentioning a *proviso* not peculiar to the Commissaries, but common to them with all the other courts in Scotland at that time.

It is then clear, that the Commissaries once enjoyed this branch of voluntary jurisdiction as extensively as any other court ever enjoyed it. Let the sheriff-clerks say by what authority they are deprived of it. The instructions 1666, leave the privilege of registration as they found it. At the same time, a very pregnant argument may be drawn from the silence of the instructions 1666, to support this branch of the Commissaries' jurisdiction. By this time, it was become customary to substitute the general clause "of all judges books competent," in place of a special enumeration; and, in this view, the above *proviso* in the instructions 1563 is left out of the instructions 1666, which is in effect declaring the Commissary-court to be competent for registrations upon the authority of the general clause. For had it been intended, that there should be no registration in these books, otherways than by an express consent, the *proviso* without doubt would have been renewed in the instructions 1666. As the instructions 1563 are copied in the instructions 1666, this *proviso* could not have been left out in the latter by neglect and inadvertance; the omission must have a meaning, which can be no other than to put the Commissary-court upon the common footing that a consent at large should be sufficient.

But, in the second place, without necessity of going so far as the origin of this branch of the Commissaries' jurisdiction, a convincing argument may be

drawn from a concession the sheriff-clerks do and must make; which is, that an express consent to register in the commissary-books is a sufficient authority for registration, whatever be the sum. If so, they must also admit that the stile of registration in present use is a sufficient authority for this registration, provided it can be made out that it is equivalent to an express consent, which reduces the dispute to a question *de verborum significatione*, viz. What is the meaning and import of the clause of registration commonly used, " consenting to the registration hereof in the books of Council and Session, or others competent, to the effect that letters of horning, &c. may pass hereupon as effeirs?" This clause must undoubtedly be understood *secundum subjectam materiam*, as every clause must be. In writing a bond, the parties have no occasion to consider what court may be competent to a common process, but what courts are competent for registration. Keeping this in view, does not the clause obviously import a consent to register in any judges books where the registration can be a foundation for horning and other legal execution? From the very nature of the thing, the clause of the registration must be interpreted in the most extensive sense for the conveniency of the creditor, who lends his money upon the condition of summary execution in case of failure of payment. And as it must be indifferent to the debtor, whether horning proceed upon a registration in one court or another, he has no interest to decline any court; and therefore his consent thus interposed must be applicable to every court where express consent will make a legal registration. Will any man who borrows money make the least difficulty of giving an express consent to register in the commissary-books, if such a thing be demanded of him? What difficulty then can there be of giving a clause that sense, which the parties themselves would give were the question put to them?

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And when the history of registration, and the variation introduced in the stile within this century are attended to, they will clear the foregoing construction of the clause of registration beyond the possibility of cavil. The form of the clause of registration was originally to name one particular court where the deed was to be registered, such as the Court of Session, or Commissariot of Edinburgh, or the sheriffdom of Fife, or other particular court. This being found inconvenient, by putting it in the power of the debtor to render the clause of registration ineffectual, by retiring out of the bounds of that particular jurisdiction, the practice came in of naming many particular courts. But such a long detail of particular courts becoming burdensome, the clause was made more general by enumerating Commissary-courts, Sheriff-courts, Bailie-courts, &c. but still without the addition of a general clause, such as is now in use, ' of all judges books competent.' When we look through the records of the different courts, we find the Commissary-court more frequently named in registrable writs than any other inferior court. The reason is, that, of all the inferior courts, it is the most convenient for registration, having of all the most extensive jurisdiction; and at any rate, it was an advantage to have different

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courts to apply to, in one or other of which the debtor might be found. The form last-mentioned, of enumerating all the different courts in general, as being still too prolix, was altered some time betwixt the 1650 and 1660, and a new stile introduced, substituting a clause still more general, some times expressed thus, 'In the books of Session or other judges books;' or thus, 'In the books 'of Session or any other ordinary register;' or thus, 'In the books of Session 'or any other register that shall happen to be made use of for the time;' or thus, 'In the books of Session or of any other judge ordinary;' or thus, 'In 'the books of Session or others competent;' which last is now the established stile. From the nature of the thing it must be plain, that all these different clauses mean the very same thing, viz. a consent to registrate in the books of any judge where that consent can be effectual to produce a decree, and consequently legal execution; and when it was the common practice at that time for creditors to provide for themselves the conveniency of registrating in the Commissary-court books, it is not to be supposed that the whole monied people in Scotland should, without necessity, and even without solicitation, conspire together to give up a privilege or conveniency of registrating in the Commissary-books. And yet this must be supposed, before the clause of registration now commonly used can admit of such a construction, as to refer only to courts which have a necessary jurisdiction.

I add, that no one can entertain the least hesitation about the import of the clause, when it is considered, that, by the practice of near a century, it is universally understood to comprehend voluntary as well as necessary jurisdictions. By a list given in, it appears, that, upon the authority of the general clause alone, it has been a constant practice to record deeds without limitation of sums in the Commissary books. If consuetude be *optima legum interpres*, it ought to have no less authority in the interpretation of clauses in private deeds.

With regard to the registration of bills, which proceeds not by private consent, but by authority of a statute, the argument concludes *a fortiori* to the Commissary-court. An express consent to registrate in the Commissary books may be taken in a bond, if the general clause be reckoned not sufficient authority. There is no access to interpose such a consent in a bill of exchange; and therefore, under the statutory clause, 'competent judicature,' the Commissary-court must be comprehended, otherways the lieges are cut out of the benefit of that court altogether. But, without insisting upon this, it is extremely clear from the act 1681, that it was the intention of the legislature to put the registration of bills upon the precise same footing with the registration of bonds. The statute enacts, 'That bills of exchange shall be registrable in 'the books of Council and Session or other competent judicatories, to the ef-'fect of having the authority of the judges interponed thereto, that letters of 'horning, &c. may pass thereupon, sicklike and in same manner, as upon re-'gistrate bonds, or decreets of registration proceeding upon consent of parties;' which is supplying the clause consenting to the registration, &c. and giving

bills of exchange the same effect as if the clause were ingrossed in every one of them. Nor is it of any weight that, in a subsequent clause of the statute, the expression ' ordinary judge' is taken in a different sense, being applied to judges who have a jurisdiction in *foro contensioso*, and who can hold plea in every process that can be founded upon a bill of exchange. It is well known that the Ordinary, or Judge-Ordinary, is a general expression, and comprehends indifferently every judge who is competent with regard to the matter under consideration. The Bishop is the Ordinary in matters purely ecclesiastical: The Commissaries are Judges Ordinary in matters of marriage and divorce: The Court of Session, in all civil causes, and peculiarly so in reductions and suspensions: The Sheriff, in most ordinary causes both civil and criminal: And, with regard to decrees of registration, the Court of Session, Commissary-court, Sheriff-court, &c. are all equally Judges Ordinary. It therefore cannot create any sort of dubiety to find a generic expression applied in different senses, even in the same statute, *secundum subjectam materiam*, more than to find it so applied in different statutes, than which nothing is more common. And, were there any dubiety, which the Commissaries cannot admit, it is removed by the practice of above 60 years; as bills of exchange have been constantly registered in the Commissary books ever since the date of the act, *et optima legum interpres consuetudo.* No 281.

The arguments above set forth acquire additional strength from the act 39th, Parl. 1696, allowing bonds and other writs to be registered after the granter's death, which has reduced registrations to a point of mere form, disregarding what is the most essential to a decree *in foro*. And when bonds can be registered in the Sheriff books after the granter's death, though in that case the Sheriff can have no jurisdiction, it would be strange that it should not be lawful to registrate them in the Commissary books during the granter's life, though it is admitted, that in this case they have a jurisdiction by consent of parties.

It must also be observed, that the present dispute concerns the lieges in general, as well as Commissary-courts in particular. It is evidently beneficial to the lieges to have different courts for registration, both for the convenience of finding their debtors, and for the convenience of being well served, which people always are when they have a choice. And it would be very extraordinary to deprive people of this privilege, by giving a sense to an expression different from the sense established by constant practice, especially as registrations have become a mere form since the act 1696.

The Commissaries having set forth the grounds of law upon which their privilege is founded, proceeded to answer the objections that were stated in behalf of the Sheriff-clerks. It was urged, ' That if registrations be allowed in the Commissary books upon a consent at large, they must be entitled to hold plea upon every bond or obligation containing a clause of registration, for this reason, that, by the instructions 1563, they are declared to be judges to all contracts registered in their books, whereunto their authority is interponed.' And

No 281. the Sheriff-clerks, in support of their argument, might have added a decision of this Court, Durie, 27th March 1627, Irvine *contra* Young, No 25. p. 7309. where it was found, that a consent to registrate in the Commissary books, is a prorogation of the Commissaries jurisdiction as to all processes founded upon the deed.

This argument proceeds upon a misapprehension of the instructions 1563. There is no disguising the rapacity of the Roman clergy, nor their violent lust for power as well as property. Among other arts to draw causes to their courts, one was to use their interest with private parties to submit to their jurisdiction in civil causes. By degrees it became customary to insert a clause in deeds and contracts, binding the parties in all actions upon the deed or contract, to submit themselves to the jurisdiction of the spiritual court; and they who were the most forward in such matters, were the greatest favourites of the church. To vouch this fact we have the public records, in which there are many obligations containing such clauses. And to leave no doubt about the meaning, these obligations, beside the consent to registrate in the Commissary books, contain a separate clause, 'submitting them to the jurisdiction of the said Commissaries;' and some of them go farther, not only 'submitting to this jurisdiction' but 'renouncing all other jurisdiction in this case.' This practice fully explains the paragraph of the instructions founded on by the Sheriff-clerks, which at full length stands thus: 'That the Commissaries shall be judges to all contracts registrate 'in their books, whereunto their authority is interponed, and the party sub-'mitting him to their jurisdiction; *et hoc accumulative et non privative*,' where the expression, 'and the party submitting him to their jurisdiction,' obviously refers to the said practice of ingrossing such clauses in private deeds; which at the same time is a key to the like clause inserted in the instructions 1666, giving the Commissaries cognisance 'in all causes where the parties submit them-'selves to their jurisdiction.' And it may be observed, by the by, that this very thing is the foundation of a practice which continues to this day, that when an executor finds caution in order to confirmation, he and his cautioner are taken bound to submit to the jurisdiction of the court, and a place commonly named where they shall be cited.

These circumstances suggest a satisfactory answer to the argument. It is not laid down in the instructions 1563, nor any where, that the Commissaries shall be judges to all contracts registrate in their books, whereunto their authority is interponed; another requisite, still more essential, must concur to have this effect, viz. that there must be a clause in the contract, 'submitting to that jurisdiction,' which by both sets of instructions, as well as by constant practice, has the import of prorogating the jurisdiction of the Commissaries *in foro contentioso*. Without that clause, the bare consent to registrate in their books has not the effect of prorogating the jurisdiction of the Commissaries *in foro contentioso*. Custom has given it no such effect, and the clause gives no such effect; for, after a decree is interponed in virtue of such consent, the consent has its full ef-

fect, and no further consequence can be built upon it; and this serves to reconcile two decisions, which at first view appear contradictory. In that above mentioned from Durie, where a decree against an heir as lawfully charged to enter was sustained, though pronounced by the Commissary of Dunkeld; there has certainly been a clause submitting to the jurisdiction of that Commissary, though not mentioned in the decision; but in another decision observed by the same author, 28th November 1621, Laird of Greenock, No 24. p. 7308. the Commissaries were found not to be proper judges to an action of transferring of a contract against the heir of the contractor, though the contract itself was registrate in the Commissary books, by virtue of the consent to registration; probably for this reason, that the contract has not borne the other clause, submitting to their jurisdiction. No 281.

The Sheriff-clerks insisted on another argument, 'That it was absurd to confess a debt in judgment before a court not capable to hold plea, nor take cognizance of such debt; and it was added, that in England confession of debt cannot avail in any court, except in a court of common law, capable to hold plea upon such debt.'

It was *answered*, That the Sheriff-clerks seem to forget what they have all along admitted, that a decree of registration is good where the instrument of debt bears a clause to registrate in the Commissary-books. They must allow this not to be absurd; and yet here is a confession of debt, and also a judgment pronounced upon that confession, in a court not capable to hold plea, nor to take cognizance of such *in foro contentioso*. The Sheriff-clerks seem also to forget the act 1696 above mentioned, which empowers judges to pronounce a decree of consent against a man even after his death; such a wide difference is put betwixt a voluntary jurisdiction, and a jurisdiction *in foro contentioso*. And as to the law of England, the Mayor of London, by the custom of the city, may take recognizances, which are no other than a confession of debt before a magistrate, to save the trouble of proof. The King, by a special commission, may appoint any person to take recognizance, and a debt acknowledged before one of the clerks of the statute merchant and Mayor of the city of London, or two of the merchants of the said city for that purpose assigned, becomes what is called a statute-merchant, of the like nature with a bond in judgment or a bond in Scotland with a clause of registration. It is very true, such deeds must be enrolled in some court of record to give them the effect of execution, and so must a bond containing a clause of registration; but then, the Commissary-court is such a court of record. And it is of no importance in the argument, that a bond in judgment, or a bond containing a clause of registration, cannot be recorded in the Courts of Justiciary, Exchequer, or Admiralty; for the Commissary-court differs widely from any of these, having a jurisdiction without limitation in civil causes, where it is prorogated by consent of parties. The debtor's consent to registrate in their books, empowers the Commissaries to pronounce decrees of consent without limitation, and the debtor's consent

No 281. submitting himself to their jurisdiction, empowers them to hold plea upon that debt, even *in foro contentioso*.

Some other instances shall be given to show the difference betwixt degrees of consent, and decrees *in foro contentioso*. A charter-party may be registered in the Court of Session, or in the Sheriff-court; yet the Court of Session cannot hold plea in the first instance upon a charter-party *in foro contentioso;* and the Sheriff not at all. A bond granted to the King in a revenue matter may be registered in the Court of Session, and must be so registered if adjudication be to proceed upon it; yet the Court of Session cannot hold plea *in foro contentioso* upon such a bond. Nothing was more ordinary of old than to registrate bonds in the books of the Privy Council, though it never fell under the jurisdiction of that Court to hold plea upon actions of debt. And after all, what needs more than to give for an instance a decree of registration given against a man after his death, over whom there can be no jurisdiction.

In a question betwixt the Commissaries and Sheriff-clerks, whether it belongs to the jurisdiction of the former to authenticate tutorial and curatorial inventaries; the Court was of opinion, that this was a branch of their jurisdiction, moved by the following reasons. The causes of widows, orphans, and pupils, have in all periods of our law been privileged. By the act 105. Parl. 1487, they are entitled to bring their actions and complaints at the first instance before the King and Council. Afterward such causes came to be the province of the consistories; and upon this account a jurisdiction is bestowed upon the Commissaries by the instructions 1563, in the causes of widows, pupils, and the poor, not exceeding L. 20 Scots; they had consequently a voluntary jurisdiction in the chusing curators, which appears from the act 35. Parl. 1555, in which, though the Judge-Ordinary only is named, yet the summons or edict plainly refers to the consistorial court; and this is put out of doubt by Queen Mary's charter to the Commissaries of Edinburgh, giving them a jurisdiction in all actions concerning teinds, testaments, injuries, and the giving of curators, conform (says the charter) to the act of our Parliament, plainly referring to the said act. Therefore, they have unquestionably a voluntary jurisdiction as to the naming tutors and curators, which they enjoy at this day, and which neither is nor can be controverted. The only question then is, after tutors and curators are named before the Commissaries, whether it be the meaning of the act 2. Parl. 1672, to oblige the minor to go before another court to get the inventories authenticated? Such an absurd interpretation cannot be drawn from the statute; which was only intended to superinduce an additional check upon the management of tutors and curators, and not to break in upon any jurisdiction whatever; and nothing is more evident than that the expression, "Judge-Ordinary" in that statute, means every Judge who is competent to the naming tutors and curators.

Fol. Dic. v. 3. *p.* 354. *Rem. Dec. v.* 2. *No* 109. *p.* 210. & *No* 110. *p.* 220.

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*** Kilkerran reports this case:

1748. *December* 16.—IN the ranking of the creditors of Govan of Cameron in the year 1737, a diligence being objected to, as proceeding upon a bond registrated in the Commissaries books, which was said to be an incompetent court, the LORDS "Found the Commissaries books not a competent register for bonds or bills for sums above L. 40 Scots, unless where there is a consent of the parties to registration in these books; but in respect of the *communis error*, repelled the objection made to the registration of this bond in these books; but declared they would make an act of sederunt to certiorate the lieges of the incompetency of registrations in the Commissaries books in time coming."

The Commissaries, alarmed at this judgment and declaration, applied to be heard before any such act should be made; with which the Lords complied. They were accordingly heard; and, at the hearing, a memorial was given in by appointment: And there the matter rested till now, that the Sheriff-clerks moved the Lords to resume the consideration of the case; and the Commissaries coming to be informed thereof, again applied to be heard, as the matter had lain so long over since the former hearing.

The matter being accordingly debated in presence, the Lords, without pronouncing a formal judgment, as in a cause, came to the following resolution, 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 registrating bonds, bills, contracts and obligations, for whatever sums granted, and of authenticating tutorial and curatorial inventories; and that they would frame an act of sederunt for that purpose. And this was so resolved, notwithstanding a very strong decision referred to by the Sheriff-clerks, February 3. 1703, in the competition between Wier of Blackwood and Cochran and other Creditors of John Corse, (*infra*, *h. t.*) a copy whereof was produced from the records, sustaining the nullity of an arrestment as laid on upon the Commissaries precept, in whose court the bond on which it proceeded had been registrated, which bore for so great a sum as 3000 merks; and therefore finding the arrestment null, as laid on upon a warrant which it exceeded the power of the Commissaries to grant. But this the Lords considered as of no more effect than their own later resolution in 1737, as neither in the one nor the other the Commissaries, who were the proper contradictors, had been heard, and the merits of the case stated as now they were.

For whereas the weight of that judgment, as observed by Lord Fountainhall, was laid on this, That the Lords thought the clause of registration gave no authority, unless it had *per expressum* borne a consent to registration in the Commissaries books; the Lords now thought that to have been a misapprehension in their predecessors, of the meaning of the first instructions to the Commissaries by Queen Mary in 1563, where it is indeed true, that registration in the

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 registrate 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 condescendence 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-