

decerning him to pay to her the sum of L. 40 for meat and drink, furnished by her to the defender's self; and the verity of both which articles was referred to the defender's oath, and *in pœnam contumaciæ et in supplementum*, the pursuer's oath was taken upon the libel, whereupon sentence was pronounced; which being suspended, because it was given *a non suo iudice*, the matter being civil, and albeit referred to oath, whereby the Commissary might appear to be competent judge, yet seeing the subject exceeded L. 40, and so is above the injunctions given to Commissaries, whereby they have only power in civil matters, where the same are referred to the parties oath, if the sum exceeded not L. 40, and above that sum they cannot proceed, albeit referred to oath;—the LORDS found not this reason relevant to suspend the decret, but sustained the same, though it was in a matter of L. 80; for ordinarily the LORDS found, that the ecclesiastical judge may proceed in civil matters referred to oath, extending to 100 merks, and this being but for 20 merks more, the same was not thought of such importance as to annul the sentence; for as, concerning the other article of L. 40, albeit it was in the same libel and sentence, yet it was considered as if it had been pursued in a distinct libel, and as a several sentence, seeing it was for another subject and cause of a different nature from the other, the one being for relief, and the other for furnishing of vivers to himself; neither was the offer of the suspender to give his oath received now *post sententiam*, there being no cause alleged to excuse his absence and not compearance at the day whereto he was cited; and that the pursuer's oath was also taken upon the truth of the libel, whereby there might be fear of perjury if the other party's oath should now be taken, if he should deny the libel.

Act. *Cunningham.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. I. p. 506. Durie, p. 718.*1669. February 5. JAMES DEANES *against* ALEXANDER BOTHWEL.

ALEXANDER BOTHWEL of Glencorse, being convened before the Commissaries of Edinburgh, for slandering James Deanes, procurator before the Commissaries, in calling him a false knave, publicly in the Parliament House, and at the Cross; the same being proven by witnesses, he was decerned to stand at the kirk door of Glencorse, where both parties dwelt, and acknowledge his fault, and to pay L. 100 to the poor, and L. 100 to the party. Bothwel suspends on these reasons; *1st* That the Commissaries could not ordain him to stand at a congregation, which is an ecclesiastical censure; *2dly*, That they could not also fine him to the poor, nor decern any thing to the party, but the expences of plea, seeing there was no other damage libelled nor proven; *3dly*, That the witnesses were not habile, being the pursuer's own servants. The charger opposed the decret, wherein the suspender was compearance, and objected nothing

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defender's oath, and he held as confessed for not appearing, though the debt exceeded 100 merks.

A decree of a Commissary for two sums, each of which was under 100 merks, but when added together exceeded that sum, was sustained.

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The Commissaries having fined a defender in a process of slander in L. 200 Scots, the Lords sustained the decret.

No 290. against the hability of the witnesses then, and therefore cannot now quarrel their testimonies, and that it was most proper for the Commissaries to cognosce upon slander or defamation, neither was his standing in order to repentance, but in order to restoring the party to his fame.

THE LORDS repelled the reasons, and sustained the decret in all points.

Stair, v. 1. p. 598.

* * * Gosford reports the same case :

GLENCORSE being decerned by the Commissaries of Edinburgh in the sum of 300 merks, and to make public reparation by standing at the kirk door of Glencorse, and confessing his fault to the church on a Sunday, for scandalizing the said James, and calling him false knave, did suspend upon the incompetency of the judge, and that kirk sessions were the only judges competent, and could ordain that manner of satisfaction ; as likewise, that the mulct and fine was exorbitant, and more than an inferior judge could decern ; notwithstanding whereof, the letters were found orderly proceeded.

Gosford, MS. No 104. p. 37.

1675. December 8.

No 291.

WRIGHT, and HAMILTON, her Spouse, *against* VEITCH.

CHRISTIAN WRIGHT, and John Hamilton, her spouse, pursues William Veitch, her tutor, before the Commissaries of Edinburgh, who proponed a declinator, and thereupon raised advocation on this reason, That this being a tutor account, the Commissaries are not competent judges thereto ; for by the act of parliament, *anno* , erecting Bishops with the power of Commissaries, ' their jurisdiction is limited to matters consistorial, to proceed conform to the ' Bishop's injunctions, which are recorded in the books of sederunt,' and bear particularly, ' consistorial causes and no others, except small matters referred ' to oath, not exceeding L. 40.'

THE LORDS found the Commissaries had no such jurisdiction, and therefore advocated the cause.

Fol. Dic. v. 1. p. 506. Stair, v. 2. p. 378.

* * * Dirleton reports the same case :

1675. December 9.—A GENERAL action of count and reckoning, at the instance of pupils and minors *post tutelam et curatelam*, against their tutors and curators, is not consistorial and competent to be pursued before the Commissaries, where the import of the action exceeds the sum and value to which the Commissaries may be judges ; and the pretence that there are diverse articles,