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The Lords found not the defences relevant to annul the decreet, or to hazard the loss of the pursuer's probation; but seeing the defender burdened himself with a contrary probation, the Lords inclined to admit the same, if it were sufficiently pregnant; and therefore ordained the pursuer, before answer, to adduce witnesses, that the goods were never taken off the shore, but boated there.

Fol. Dic. v. 1. *p.* 494. *Stair, v.* 1. *p.* 543.

*** Gosford reports this case:

Alexander Black having obtained a decreet before the Commissary of St Andrew's, against the deceased James Scot, for L. 168 Scots, as the price of a parcel of vinegar, wherein the defunct was holden as confessed, there was a transferring of the said decreet pursued against the defunct's heir; who *alleged*, That the decreet was null, being given by the Commissary, who was not a competent judge; and the defender's father being dead since the decreet, and being only holden as confessed for non-compearance, when he was upon death-bed, the pursuer ought yet to pursue for the said debt, and prove as he would be saved. This allegeance was repelled, and the decreet sustained, seeing by the death of the defender, that manner of probation would fail. But if the defender could propone any relevant defence against the debt, the Lords did allow him *in hac instantia* to propone the same specially, the Commissaries being in use to judge of civil matters of small importance, where the libel is referred to the parties' oaths.

Gosford, MS. No 7. *p.* 3.

1748. *December* 17. Sheriff-Clerks *against* Commissaries.

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Found, that the Commissaries have no power to pronounce decrees in absence for any sum above L. 40 Scots.

Betwixt the Sheriff-clerks and Commissaries it was debated, whether decrees in absence pronounced by the latter for sums above L. 40 Scots are effectual in law, or whether they are to be considered as simply void. The Sheriff-clerks founded upon the instructions 1563 and 1666, limiting the jurisdiction of the Commissaries with regard to actions of debt and other causes referred to oath, to the sum of L. 40 Scots. In answer to this, the Commissaries opponed the same instructions, declaring their Court competent to all actions where the parties submit themselves to their jurisdiction; whence they argued, that they must have a radical jurisdiction in matters above L. 40 Scots; because, by the law of Scotland, private consent cannot create a jurisdiction. From these premises they inferred, that a decree in absence must be good, even where the sum is above L. 40 Scots, and that the meaning of the instructions must be not to render void such a decreet, but only to bestow upon the lieges a privilege of declining the jurisdiction, if they thought proper.

In support of this proposition, they entered into a particular consideration of the doctrine of the prorogation of jurisdiction, as received among us. They observed, that in reasoning upon this subject, we are apt to draw our authorities from the Roman law, without considering that the principles of the Roman law, in this matter, are *toto cœlo* different from ours.

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The Roman doctrine of prorogations is laid down with great accuracy, *l.* 1. *D. De judiciis*: The words are, 'Si se subjiciant alicui jurisdictioni, et consentiant; 'inter consentientes cujusvis judicis qui tribunali præest, vel aliam jurisdic-'tionem habet, est jurisdictio.' Thus, though consent by the Roman law cannot make a man a judge who is no judge, yet it has the effect to give a judge a new jurisdiction, and to enable him to determine in cases to which, without the consent, he is altogether incompetent. Upon this footing, a civil judge may determine in a criminal matter, *et e contra*; and a judge whose jurisdiction is limited with regard to sums, may give judgment without limitation, 'Judex qui 'usque ad certam summam judicare jussus est, etiam de re majori judicare po-'test si inter litigatores conveniat. *l.* 74. § 1. *D. De judiciis*.' And hence the doctrine laid down by commentators may be easily understood. They mention four different ways by which a jurisdiction is limited, viz. with regard to time, place, persons, and causes. As to the two first, it is evident from the law above cited, that there can be no prorogation. A judge, after his commission is at an end, has no manner of jurisdiction; and as little jurisdiction has he without the bounds of his territory. But, with regard to persons and causes, the matter is otherwise; for though consent will not make a private man a judge, yet supposing him a judge, it will entitle him to give judgment against a person not otherwise subjected to his jurisdiction, and in a cause with regard to which he has no original jurisdiction.

The doctrine of the law of Scotland differs widely; and *first*, with regard to persons, it is established by act of parliament, that even an express consent will not empower a judge to pass sentence against a man who lives without his territory, and consequently is not subjected to his jurisdiction. The act 38th parl. 1685, declares the registration of deeds against parties who dwell not within the jurisdiction, to be void and null, with all the execution that follows thereupon. Therefore a consent to registrate in the books of a competent Court, which in all views will comprehend the Sheriff's books, will not, however, give the Sheriff a jurisdiction over any person who is not locally subjected to his jurisdiction. And accordingly a consent by a debtor in Caithness to registrate in the sheriff books of Edinburgh, will avail nothing. Next, as to causes, a consent to registrate in the books of Justiciary or Exchequer, will not entitle these judges to pronounce sentence for an ordinary debt. The decree will be null, with all execution following thereupon. Further, if a man shall bring a process before the Exchequer for payment of an ordinary debt, the debtor's appearance and pleading peremptory defences will not prorogate the jurisdiction; the decree is void and null. And such has been the opinion of this Court in much

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narrower cases; an action of contravention of lawburrows is peculiar to the Court of Session; and if such a process be brought before the inferior Court, the defender's appearance will not prorogate the jurisdiction; the decree will be null by way of exception, 6th July 1611, Kennedy against Kennedy, No 20. p. 7307.: And the like was found in an extraordinary process of removing, founded upon the tacksman's failure to pay his rent; the decree pronounced by the inferior judge was found null, though the defender appeared and pleaded his defences, without objecting to the jurisdiction; Falconer, 22d December 1681, Beaton *contra* his Tenants, No 21. p. 7307.

It appears then to be a maxim with us, that consent alone cannot found a jurisdiction, nor empower a judge to determine any cause as to which he has no jurisdiction, nor against any person not subjected to his jurisdiction. If now consent cannot operate with us, as with the Romans, to erect a jurisdiction, the only effect that can be given to consent is, to bar a declinator when a party enjoys the privilege to be exempted from a Court which has a radical jurisdiction over him; and the barring of such a privilege is the only prorogation of jurisdiction that is known in the law of Scotland. Thus a decree pronounced by an inferior Court against a member of the College of Justice, is good by prorogation, if the Court be not declined; and a decree pronounced by the Court of Session in a maritime cause is good, where the defender appears and submits to the Court, without insisting upon his privilege of being heard in the first instance before the Admiral.

Hence it was urged, that if consent create not a jurisdiction, nor has any other effect than to bar a privilege of declining a court, the Commissary Court must have a jurisdiction in matters above L.40 Scots, because they can judge without limitation upon the consent of parties, which can have no other effect than to bar a declinator; and if so, the Commissaries may pronounce a decree in absence for whatever sum, as well as they can pronounce a decree *in foro*, when the defender appears and states his defences without moving his declinator. And to prove that this is the legal sense of the instructions, a decision was quoted, pronounced recently after the instructions 1666, by judges who best knew their meaning, because probably they had a hand in composing them. It is reported by Stair, 25th June 1668, Black against Scot, No 26. p. 7309. where a decree in absence, pronounced by a Commissary for L.126 Scots, upon the defender's being held as confessed, was, after his death, sustained against his representatives, as good evidence of the debt.

Replied, That strictly speaking, the Commissaries never had a jurisdiction in civil causes, whether the sum was great or small. Civil claims were brought into the ecclesiastical Court in a religious view, and as a matter of scandal; and when a decree was pronounced for the sum claimed, it was not upon the medium of being a civil debt, but upon the medium of restitution as part of the penance enjoined. This application to the spiritual Court was rendered unnecessary after the oath of party was introduced from the Roman law; and ac-

cordingly, it is laid aside by the instructions, except for sums within L. 40: So far a branch of civil jurisdiction is communicated to the Commissaries; and in actions of debt within L. 40, referred to oath, they now interpose, not as spiritual, but properly as civil judges. Taking then the matter in its true light, the jurisdiction of the Commissaries is not limited by the instructions, but a new jurisdiction bestowed upon them in actions of debt to the extent of L. 40 Scots; with regard to sums beyond that extent, they have no jurisdiction more than the Court of Justiciary has in civil causes. But then this Court stands upon a singular footing, that private consent can bestow a jurisdiction upon it; for so is expressly declared by the instructions; and here is one instance of a prorogation in our law, similar to prorogations in the Roman law. Perhaps it may be the only instance in our practice of a jurisdiction created by consent; but, supposing it the only instance, it removes the argument urged for the Commissaries, after which the authority of the instructions stands clearly against them, that being limited in civil causes to L. 40 Scots, they cannot pronounce a decree in absence for a greater sum.

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"Found that the Commissaries have no power to pronounce decrees in absence for any sum above L. 40 Scots."

Fol. Dic. v. 3. p. 340. Rem. Dec. v. 2. No 111. p. 220.

SECT. IV.

Prorogation of the jurisdiction of a Judge, against whom there lies a personal objection. Prorogation of the jurisdiction of the Court of Session, in cases of which they are not judges in the first instance. Effect of proponing other defences after declinator is repelled.

1629. *January* 29. KELLIE *against* WINRAHAM.

No 28.

A DECREET of deprivation, pronounced by the Bishop of Dunkeld against Robert Winraham, as one of the prebendaries of the Chapel-Royal, was sustained though it was quarrelled by way of suspension, because the bishop who was judge, was rebel at the giving thereof, and so had no person to judge; which was repelled after sentence, the same not being proponed before the pronunciation thereof, *l.* 3. *D. De officio Prætorum.*——See PERSONA STANDI.

Fol. Dic. v. 1. p. 494. Durie, p. 419.