

this point was not decided, seeing it was but drawn in to be reasoned upon, by way of argument in this case, where the action was moved upon an arrestment, directed by another inferior Judge, and the case appears not alike; for, by the arrestment made by the Lords' letters, all the Judges within the realm may seem to proceed, seeing the Lords' jurisdiction is universal, over all the kingdom; and, if the arrestment made by any inferior Judge may be a warrant to that Judge himself to proceed thereon, far more may it appear reasonable, that he may proceed upon the warrant of the more Supreme Judge; for it is, in effect, a power to him so to do, which is not alike among inferior Judges themselves, where their acts are distinct, and their jurisdiction is not universal, and where, *par in parem non habet imperium*, neither may he usurp upon what pertains to his equal; even as an inferior Judge may proceed upon an obligation, although registered in the books of Session.

Clerk, Gibson.

*Durie, p. 710.*

No 199.

1635. December 5.

SUTOR against CRAMOND.

A SHERIFF may grant a precept of poinding upon his own decree, and cause the same to be put to execution, without a particular warrant from the Court of Session.

*Fol. Dic. v. 1. p. 502. Durie.*

No 200.

\* \* This case is No 8. p. 3098. *voce* CONSUETUDE.

1674. January 9.

DENHOLM against JOHNSTON.

In a transferring of an action, depending before the Commissaries, wherein there was litiscontestation; it was *alleged* for the defender, The Commissaries being competent Judges, *in prima instantia*, as likewise to the transferring of such processes as depend before them, it was against all form to transfer before the Lords, who are only in use to transfer decreets pursued or recovered before themselves. It was *replied*, That, as the Lords may advocate the cause from the commissaries, so they may transfer any dependence before them; likeas, the pursuer having a declarator raised before the Lords, for recovering of that same debt, these actions ought not to divide; and the Session being the more sovereign judicatory, ought to draw that action before the Commissaries to the Session, there being *contingentia causæ*. THE LORDS did sustain the allegiance, and found, that, in form, the transferring against the heirs and executors of a defunct, who was pursued before an inferior Court, could not be intended but

No 201.

The Court, before which a process depends, is the only one competent for transferring, unless the representatives live in another territory; in which case, the Court of Session must transfer.

No 201. before that same Judge before whom the principal cause was intended, unless those that did represent him did not live within that jurisdiction, and were *alterius fori*; in which case, the Lords of Session were the only competent Judges.

*Fol. Dic. v. 1. p. 501. Gosford, MS. No 667. p. 393.*

No 202. 1677. January 26. PROCURATOR-FISCAL of GLASGOW *against* COWAN.

THE Commissary of Glasgow, having sustained process at the instance of the Procurator-fiscal, for the trial of a falsehood of executions, whereupon a decret had proceeded; and having, upon probation of the falsehood, decerned the user of the said executions to pay L. 300 to the Procurator-fiscal, as a fine; and the said decret being suspended; the LORDS found, that the Commissary was not a competent Judge to the improbation of executions, by way of action, seeing they cannot reduce their own decreets; and improbation is a reduction *ex capite falsi*.

Reporter, *Justice Clerk*.

Clerk, *Hay*.

It is to be considered, that the most part of decreets before inferior Judges are for null defence, and upon false executions; and it were hard, that there should be no remedy but by improbations before the Lords, which may depend long, and are very chargeable; so that decreets before inferior Judges being, for the most part, for inconsiderable sums, the remedy should be worse than the mischief.

It appears, indeed, that the Commissaries have not power to fine; that being a criminal jurisdiction; and that they are not Judges to improbation by the indirect manner; the trial of falsehood, by circumstances and presumptions, being *altioris indaginis*; and of that difficulty, that it ought not to be left to an inferior Judge. *Item*, The trial of falsehood, as to that effect, that falsaries may be punished, ought not to be by any inferior Judge: But it seems to be just and necessary, that parties, grieved by such decreets, should be allowed to pursue the obtainers of the same, to hear and see them reponed against the said decreets, upon that ground, that they were not cited to the same; to be proved by the witnesses and executor himself, declaring that they pursue to that effect allenaryly: And it appears not to be inconsistent with law and form, that this course should be taken; seeing the Judge does not reduce his own decret, *ex capite iniquitatis*; and it may be provided, that such pursuits, though they be upon the matter improbations, are only to the effect foresaid; and that no other effect or consequence shall follow upon the same; and *multa fiunt per indirectum*, which cannot be directly; and if a party, who is holden as confessed, should raise a libel before an inferior judge that it may be found that he was not *contumax*, being out of the country, or