and none of them doth exceed the said sum, is of no weight, seeing the reply of *articulatus libellus* is only in the case where the debtor is pursued for diverse sums, which, in effect, resolves in diverse actions; whereas *actio tutelæ* is but one general action, and upon one ground, viz. The defender is liable as tutor and curator, whatever and how many soever the articles of intromission be; and, upon the ground foresaid, the pursuit before the Commissaries was advocated. No 291.

Dirleton, No 314. *p.* 154.

Reporter, *Newbyth.*

*** This case is also reported by Gosford:

1675. *December* 11.—THERE being a bill of advocation for a pursuit, depending before the Commissaries, given in at the instance of John Hamilton and his Spouse, against William Veitch, for making count and reckoning of his intromissions with the said Christian's means and estate, as being tutor to her, *sine qua non*, upon these reasons, That it was a civil action, and not proper to the Commissaries, seeing all the principles of the civil law, whereupon *actio tutelæ et contraria* were founded, would fall under the debate and modification of expenses, and manner of probation, which were only proper to the Lords of Session, would necessarily fall under the interlocutors of this process; 2*do*, That the libel did extend to twenty thousand pounds Scots, which was far above the sums whereupon the Commissaries are empowered to judge, conform to the 6th act of Parliament 20th King James VI. giving them only power to judge according to their injunctions, and in civil actions where the libel doth not exceed two hundred merks, unless the same be referred to the party's oath. It was *answered*, The pursuit being at a minor's instance, against the tutors, and she being confirmed executrix, the Commissaries were most proper judges; and albeit the libel did contain a greater sum, yet it was *articulatus libellus*, and no article did amount to any greater sum.——THE LORDS did advocate the cause from the Commissaries, as not competent judges, by their injunctions, and act of Parliament, the libel not being referred to the defender's oath.

Gosford, MS. No 816. *p.* 84.

*** The reverse was decided, Horseburgh against M'Levain, No 287. p. 7576.

1696. *July* 1.

MATHEW PATERSON and Others *against* ROBERT ROSS and THOMAS URQUHART.

No 292.
An adjudication on a decree *cognitionis causa*.

HALCRAIG reported the competition between Mathew Paterson, and other creditors of James Cuthbert in Inverness, against Robert Ross and Thomas Urquhart there. *Objected* against Ross and Urquhart's adjudications, that they

No 292.
recovered before the Commissaries, for a thousand merks, found null.

proceed upon a null decreet *cognitionis causa*, because the sum being 1000 merks and upwards, the debtor was pursued *coram non suo judice*, viz. the Commissaries, who are incompetent above L. 100 Scots, by the regulations 1666, recorded in the books of Sederunt. *Answered*, 1*mo*, Wherever there is *interpositio juramenti*, the Commissaries are competent, though the sum be great; 2*do*, Custom has founded their jurisdiction by a general practice; 3*tio*, There are real diligences led on this decreet, and it is hard to cause them adjudge of new; for then they are without year and day, and so would lose their debts. *Answered*, This topic, where an oath intervenes, has been expressly urged, and repelled, and the Commissaries' decreets found null, where they exceeded L. 40; as appears from Durie; Gordon, No 284. p. 7573; Irving, No 25. p. 7309; Lindsay, No 286. p. 7575; Richardson, No 289. p. 7576; and there was no desuetude in this case that had altered the fixed boundaries of these judicatories where they encroached upon one another's province; and the leading adjudications could not sustain the null decreets, *nam sublato fundamento corruit accessorium*. What if they had taken their decreets before the Admiral Court, the doing real diligence there could not validate and supply the original defect? It is true, if the debtor had compeared either in the first decreet, or adjudication, and proponed other defences, that would have been a prorogation and acknowledgment of the competency; but here all the decreets were in absence, and against a minor, and so no homologation could be inferred. Some thought there was *error communis* here, *qui facit jus quoad præterita*, else many diligences might, by this interlocutor, be subverted. Others thought *in modum pœnæ*, for not electing a competent judicatory, it were just to lop off the penalties, and other advantages, (as uses to be done where apprisings are informal) and let it subsist for the principal and annualrents; but the plurality preferred the other adjudgers *simpliciter*; and so, upon the matter, found the decreets null, in so far as they craved to come in *pari passu* with them.

Fol. Dic. v. 1. *p.* 505. *Fountainhall, v.* 1. *p.* 724.

1793. *February* 23. David Park *against* John Rutherford.

No 293.

David Park having obtained from the Commissary-depute of Peebles a decree against John Rutherford, for L.3:6:6d. of principal, with 15s. of expenses of process, and 3s. for expense of extract, presented a bill, praying for letters of horning in common form. The clerk to the bills refused to write upon it, in respect the sum included in the decree exceeded L. 40 Scots, But the case having been reported by the Lord Ordinary on the bills, the Court were unani-