

No 292.
recovered be-
fore the Com-
missaries, for
a thousand
merks, found
null.

proceed upon a null decret *cognitionis causa*, because the sum being 1000 merks and upwards, the debtor was pursued *coram non suo iudice*, viz. the Commissaries, who are incompetent above L. 100 Scots, by the regulations 1666, recorded in the books of Sederunt. *Answered*, 1mo, Wherever there is *interpositio juramenti*, the Commissaries are competent, though the sum be great; 2do, Custom has founded their jurisdiction by a general practice; 3tio, There are real diligences led on this decret, 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 corrui 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 decret, 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 pænæ*, 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. Fountainball, 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-

mously of opinion, that as the excess was occasioned merely by the expense of process and of extract, the prayer of the bill ought to be granted.

No 293.

D. D.

Lord Ordinary, *Craig*.
Fol. Dic. v. 3. p. 354. Fac. Col. No 33. p. 66.

S E C T. IV.

Of Assessors to the Commissaries.—Whether Commissaries must reside where their Courts are held. Where the Courts must be held.

1606. December 27. BURNET *against* COMMISSARIES OF EDINBURGH.

SAMUEL BURNET, by a supplication given in to the Lords, declaring that he was pursued by Margaret Gibb, before the Commissaries of Edinburgh, for adherence in respect of marriage, perfected betwixt them by faithful promise, and carnal dealing following thereupon; for probation thereof, she produced two very suspected witnesses, viz. her master, to whom she had been taverner; and being far in his debt for counts of wine, he saw no means so ready to obtain payment of that debt, as if she, becoming wife to the complainer, he might obtain payment of his penny; and the other witness was a servant boy of the said house, with whom she was suspected and slandered to have been hamlie. It was a dangerous matter for him, if any inconsiderate proceeding should be rashly used in that cause; and therefore desired that the Lords would either take to themselves the advisement of the process, or join some of their number to the Commissaries of Edinburgh, to the advisement thereof; conform to the which desire they gave commission to the collector and clerk of register, Cranstoun-Riddell, and Myrecairnye, or any three of them, and adjoined them to the Commissaries of Edinburgh, in advising the said process, which was altered the next day.

December 30.—THE LORDS having, upon the supplication of Samuel Burnet, adjoined four of their own number to the Commissaries of Edinburgh, for assisting them in advising the process depending betwixt the said Samuel and Margaret Gibb, for perfecting the marriage alleged promised by Samuel to her, with carnal dealing; thereafter the Commissaries complaining to the Lords, that the form would be slanderous both to the Lords and Commissaries, the Lords, by their deliverance, discharged the former commission, and declared, that in time coming they would not make any such ordinance, but would suffer the Commissaries to proceed in their own jurisdiction upon their own peril *in prima instantia*, unless they found manifest and just cause of advocacy.

Fol. Dic. v. 1. p. 506. Haddington, MS. Nos 1191. & 1194.

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 It had been the practice to join some of the Lords of Session with the Commissaries, in judging of processes of adherence. But this was given up, and the Court of Session refused to interfere.