

THE LORDS found the reason relevant, and proven by the instrument under the hand of the same clerk who subscribes the decret, that before expression of the special tenor of the sentence, the advocacy was produced; yet seeing that the Sheriff might have doubted, whether the general expression was sufficient, not to admit the advocacy, THE LORDS only turned the decret into a libel.

Stair, v. 2. p. 475.

No 11.

1678. July 3.

BOID *against* SIMPSON.

MR ROBERT BOID, minister, having obtained decret against Robert Simpson, before the Commissaries of Glasgow, for defaming him as a perjured person; he suspended, on this reason, that the decret was null, because he being first pursued before the Bailie of Cunninghame, in this cause, he did raise advocacy; which doth not only advocate that cause as to that summons, or instance before that judge, but as to all other instances before that or any other inferior judge; and the citation, on the advocacy, put the charger in *mala fide* to pursue that cause any where, till the advocacy was discussed; which hath ever been sustained, otherwise advocations would import nothing, if a new instance, or another judge might elude the same; but, in this case, not only was the advocacy intimate to the charger, but produced to the Commissary, and a defence founded thereon, which was unjustly repelled.—It was *answered*, That if the advocacy had proceeded upon reasons, for which the Lords were only the proper Judges, and, therefore, craving the cause to be advocate to them, it would have stopped all inferior judges; but this advocacy, proceeding only upon incompetency of a bailie to discuss defamation or slander, which is proper to the Commissaries, it did not impede the party to pass from the process, and to insist before the Commissary.—It was *replied*, That whatever was the reason libelled in the advocacy, it brings the cause before the Lords; and many other reasons might have been added at the discussing; and the tenor thereof doth prohibit *all inferior judges to proceed in that cause*.

THE LORDS found, That the Commissary ought not to have repelled the defence upon the advocacy, and therefore allowed the defender to answer as in a libel, without annulling the decret; and because he had a reason against the probation, ordained the testimonies of the witnesses, before the Commissaries, to be produced.

Stair, v. 2. p. 627.

No 12.

Advocation, though proceeding upon the ground of the incompetency of a particular Judge, found to debar all other inferior judges, tho' they might be competent.

1679. December 16.

ALLAN *against* LUKE and M'KEAN,

ROBERT ALLAN having pursued Luke and M'Kean for a parcel of wine delivered by him, by their warrant, to John Guthry in Douglas; for proving where-

No 13.

Advocation sustained at the instance

No 13.
of the puruer
of a process,
on account of
iniquity in
the Judge.

of, he produced a decret at the instance of Luke and M'Kean against Guthry, upon that same narrative, before the Commissary of Lanark, decerning him to pay the wine, and relieve them; yet the Commissary of Glasgow would not sustain the decret, unless Allan proved that the process before the Commissary of Lanark was pursued by Luke or M'Kean, or by their warrant; whereupon Allan raised advocation, at his own instance, before the Commissary of Glasgow, upon iniquity, with a reduction of the Commissary's interlocutor.

THE LORDS found, That a decret of the Commissary of Lanark was probative; and that the Commissary of Glasgow should have sustained the same, unless collusion had been positively offered to have been proven by the oath of Luke or M'Kean, or *per membra curiæ*, that the whole affair was carried on by Allan, and not by them.

Stair v. 2. p. 725.

1686. *March 24.*

MEAN *against* M'NEIL.

No 14.
A party who
had been re-
poned against
a decree, and
allowed time
to give in de-
fences, hav-
ing advocat-
ed; this
found irregu-
lar, and the
cause remit-
ted.

ROBERT MEAN, postmaster, gave in a bill against one M'Neil, bearing, that he was pursuing him, before the bailies of Edinburgh, for his house-mail; and, after he was decerned, he craved to be reponed; and the bailies having superfeded extract for a time, that he might give in his defences, he, instead thereof, steals out an advocation, and produces it; which also contains an advocation of any removing Robert should pursue against him, though he was not yet warned.—THE LORDS found it irregular in both its parts, and therefore annulled the advocation as to the removing, and remitted the other action back to the bailies.

Fol. Dic. v. 1. p. 27. Fount. v. 1. p. 409.

1704. *July 11.*

ISABEL STIRLING *against* HAMILTON of Grange.

No 15.
A cause ad-
vocated from
the Commis-
saries as to a
single point,
regarding the
admissibility
of witnesses,
and allowed
to proceed as
to the other
points.

ISABEL STIRLING pursued Hamilton of Grange, before the Commissaries of Edinburgh for adherence, and offered to prove she was lawfully married to him, and had born him children; and yet he had gone and married another wife. The Commissaries admitted her marriage to probation; and she adducing her father, brothers, and sisters, as witnesses, it was *objected*, That, by their propinquity of blood, they were inhabile to depone in her favour. *Answered*, The marriage being private, there was *penuria testium*, and no others were present.—*Replied*, clandestine marriages are not to be encouraged; and if people will go on in that manner, they ought at least to adhibit indifferent unconcerned witnesses.—The Commissaries repelled the objection, and admitted them *cum nota*.—On this Grange gave in a bill of advocation to the Lords, complaining of their iniquity in receiving such partial witnesses. Some of the Lords thought the Commissaries being sole judges, in the first instance, of divorces and adherences, they should