June 7. 1825. *Appellant's Authorities.*—Paisley, Jan. 13. 1776, (8228.); University of Glasgow, Nov. 18. 1790, (2104.); 3. Ersk. 3. 66.; Wallace, Jan. 25. 1717, (3389.); 1. Bell, 275.; 2. Bell, 503.

Respondents' Authorities.—Leitch, July 10. 1680, (2077.); Whitelaw, May 20, 1814, (F. C.)

J. CHALMER—A. DUTHIE,—Solicitors.

No. 35. JEAN BROWN and her Curator ad litem, Appellants.

MARY BOGLE and Husband, Respondents.

Process.—Found, (affirming the judgment of the Court of Session), That the Court of Session have, on good cause shewn, power to recall letters of advocation after they have been signetted.

June 8. 1825.

1ST DIVISION.

JEAN BROWN, the wife of Richard Monkhouse, instituted an action of damages for defamation in the Commissary Court of Glasgow, against Mary Bogle, wife of Michael Gilfillan. The action was allowed to fall asleep without defences having been lodged. Thereafter, a new libel relative to the same defamation, and concluding for damages, was raised in the Court of Session, in which Bogle, founding on the action in the Commissary Court, pleaded lis alibi, and the Lord Ordinary before answer ordered condescendence and answers.

Bogle having wakened the action in the Commissary Court, and lodged defences, the Commissaries found, that she and her husband were entitled to insist that the summons of damages should either be proceeded with or abandoned, and decree of absolvitor obtained; therefore sustained the summons of wakening at their instance, and before answer ordained Brown to reply to special defences pleaded to the summons of damages.

Brown then presented a bill of advocation, but she did not lay the Inferior Court process before the Lord Ordinary, or intimate the step thus taken to Bogle. His Lordship passed the bill without caution ob contingentiam; and the clerk indorsed the fiat ut petitur. Next day, the letters were expede, and passed the signet. On that day, Bogle having learned what had happened, presented a note to the Lord Ordinary, craving time to petition the Court, but did not intimate the note to Brown. The Lord Ordinary thereon prohibited the expeding the letters of advocation for eight sederunt days, that she might present a petition to the Court. By the time, however, that this deliver-

ance was communicated to Brown's agent, the letters had been expede, and signetted. June 8. 1825.

Brown's agent having refused to agree to a recall of the letters, Bogle and her husband presented a petition to the Court, praying for a warrant to recall the letters of advocation, and to remit the bill to the Lord Ordinary to refuse the same, with expenses; and in the mean time to prohibit the clerk from enrolling the letters of advocation. Their Lordships (27th January 1824) appointed answers, and in the mean time prohibited enrolment; and thereafter granted warrant for recalling the letters of advocation, and remitted to the Lord Ordinary to recall his interlocutor, to hear parties on the bill de novo as he should see cause; and found Brown liable in expenses.*

Brown appealed.

Appellant.—1. In carrying through her bill of advocation, the appellant was not guilty of the slightest violation of the rules of Bill-Chamber procedure, as fixed by Acts of Parliament, Acts of Sederunt, and established practice. She had not in her power to lay the process before the Lord Ordinary, because her agent had been compelled by a caption to return it to the clerk of the Commissary Court. Intimation was not necessary in point of form, and de facto the respondent was quite aware of the appellant's intention to advocate.

2. The bill of advocation having passed his Majesty's signet upon a regular warrant, it was ultra vires of the Court of Session to recall the expede letters. Expede letters were no doubt recalled in the case of Keith *v.* Grinton, but a radical nullity in the warrant was the reason. Here there exists no such objection.

Respondent.—1. The whole of this proceeding is a trick to obtain an advantage over the respondent, and deprive her of the security afforded by caution in an advocation for the expenses of the suit. The advocation was liable to insurmountable objections in point of form. In obtaining the bill past, the appellant kept the Lord Ordinary in ignorance of the true nature of the case, by omitting to lay the process before his Lordship; and to effect the same purpose, did not intimate the proceedings to the respondent's agent,—a precaution essential to the validity of the steps adopted. This, besides, was not a case

* 2. Shaw and Dunlop, 612.

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where contingency could be introduced as a ground of advocation,—that was a mere pretence to evade the enactment of the 50th of Geo. III. prohibiting advocations from interlocutory judgments of the Inferior Courts in Scotland.

2. The Court of Session has indisputably the power of passing and suspending bills; and, in special circumstances, also the power, on good cause shewn, of recalling letters of advocation. No injury has been done to the appellant, as the remit is merely to hear parties de novo,—and if she be entitled to have her bill passed, that will be granted.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed, 'with L. 50 costs.'

LORD GIFFORD.—My Lords, There is an appeal before your Lordships, heard a few days ago, in which Jean Brown, wife of Richard Monkhouse, is appellant, and Mrs Mary Bogle, spouse of Michael Gilfillan, and the said Michael Gilfillan for his interest, are respondents; which is an appeal against an interlocutor of the Lords of the First Division, arising under the following circumstances:—It appears that, in the month of January 1822, an action was commenced in the name of Mrs Monkhouse against the respondent Mrs Gilfillan, and against her husband for his interest, before the Commissary Court of Glasgow, which has a jurisdiction in matters of scandal, the summons being in the style of a libel for defamation. My Lords, it appears that no defences were returned, and that this action afterwards, in the language of the law of Scotland, fell asleep.

In the year 1823, another action was raised, for the same defamation, in the Court of Session. My Lords, to that action a defence was put in by the respondents, that there was this action pending in the Commissary Court, and therefore it was contended that the action before the Court of Session could not be proceeded in. My Lords, in consequence of that defence, it was thought necessary to raise what is called a wakening of the original case in the Commissary Court of Glasgow. My Lords, the present appellant, in order to get rid of the proceeding in that action she had raised in the Commissary Court of Glasgow, then had recourse to this proceeding under the statute of 50th Geo. III. cap. 112. sect. 36., which is in these words:—'That bills of advocation 'from the Sheriff and other inferior Judges in Scotland, against interlo-'cutory judgments, shall be allowed only upon the following grounds:— 'First, Of incompetency, including defect of jurisdiction, personal ob-'jection to the Judge, and privilege of party: Secondly, Of contingen-'cy: Thirdly, Of legal objection with respect to the mode of proof, or 'with respect to some change of possession, or to an interim decree 'for partial payment; provided that, in the cases specified under this 'third head, leave is given by the Inferior Judge.' And the appellant,

on the 25th of November 1823, presented to the Lord Ordinary, in the Bill-Chamber of the Court of Session, a bill of advocation of the Commissary process; that is, a bill or petition to the Court of Session, to issue letters of advocation; which is stated to be equivalent to a writ of appeal from any of the lower Courts to the Court of Session. It is stated, that this was done without any intimation to the respondents; and that, in consequence of the advocation, the Lord Ordinary passed the bill of advocation on the same day, the 25th of November 1823, no discussion having taken place—but it having been viewed as a mere step of form not to be opposed. June 8. 1825.

I should state to your Lordships, that it is alleged to be the practice, on an application for such a bill of advocation, that the process in the Commissary Court should be produced to the Lord Ordinary, which was not done in this case, and to give notice to the other party of the application being about to be made. My Lords, no such notice of this application was given to the respondents. They, however, accidentally heard of it, and on the following day, the 26th of November, the day after the Lord Ordinary had passed the bill, they applied to the Lord Ordinary, detailing the imposition which had been practised, and craving time to petition the Court; and the Lord Ordinary, upon that occasion, pronounced an order, by which he prohibited expeding the letters of advocation for eight sederunt days, that the parties might present a petition to the Court. However, my Lords, before that order was made, they had been expeditious enough to get the letters of advocation expede.

On that an application was made to the Court of Session by the present respondents, to grant warrant to recall the letters of advocation, and, on considering the bill, to remit it to the Lord Ordinary to refuse the same with full costs, and in the mean time to prohibit the clerk from enrolling the letters of advocation. On that matter coming before the Lords of the First Division, in which Division the other matter was depending, the Lords pronounced this interlocutor on the 6th of December 1823: 'The Lords having heard this petition, they appoint the same to be seen and answered, the answers to be boxed by 'the box-day in the ensuing recess, under an amand of L. 10 sterling; 'and in the mean time prohibit the enrolling the letters of advocation 'as craved in the amended prayer of the petition.' Afterwards, on the 27th of January 1824, they pronounced the following interlocutor: 'The Lords having resumed consideration of, and advised the petition 'and answers, grant warrant for recalling the letters of advocation.'

Your Lordships perceive, therefore, by this interlocutor, the Court of Session were of opinion that the letters of advocation had been improperly granted, and therefore they granted a warrant for recalling the letters of advocation, 'and remit to the Lord Ordinary to recall his 'interlocutor, and hear the parties on the bill de novo, as he shall see 'cause; find the respondent liable in expenses hereto incurred, allow 'an account thereof to be lodged, and remit to the auditor to tax the

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'same.' So that the effect of this interlocutor was, that it should go back to the Lord Ordinary, for the parties to be heard whether that ought to have been granted or not.

My Lords,—Against this interlocutor there is an appeal, and the ground of this appeal is, that those letters of advocation ought to have passed; and it is urged (not very strongly) at the Bar, that the Court of Session had no power to recall those letters of advocation after they had been expede. However, my Lords, upon this subject a decision was cited, of Keith v. Grinton, in the year 1804, where, though the circumstances are different from the present, this proposition is established, that it was competent to the Court of Session to recall such letters of advocation. Consistently with that decision, (and no decision to the contrary being cited), the Court of Session had the power in this case to recall the letters of advocation. The Lord Ordinary himself, by the order which he pronounced on the 26th of November 1823, the very day after he had passed the bill of advocation, prohibited the expeding the letters of advocation for eight sederunt days, that the parties might have an opportunity of presenting a petition to the Court; clearly shewing, therefore, that in his judgment he had been induced to pass the bill of advocation too hastily, and that he was desirous it should be brought before the Court. It is true that order came too late, because the letters of advocation were expede before it was given. The Court of Session were of opinion, that these parties had in this case taken the Lord Ordinary by surprise; and it is clear they did not produce, before the Lord Ordinary, those proceedings which it appears, according to the general practice, should be produced;—they stated that they were not in their possession at that time; but there is no reason whatever why the usual practice should not be followed.

Another point has been made, whether there should not be previous intimation; and on that there appears to have been a difference amongst the learned Judges: though the majority of them seem to be of opinion previous intimation was not necessary, most of them seem to think intimation was usual. But there is another point which appears not to have been before the Lord Ordinary, whether there was that contingency of justice in this case which warranted the Lord Ordinary to grant these letters of advocation? It is stated, that this was precisely the same defamation for which the action had been brought in the Commissary Court, and that the plaintiff had recourse to this contrivance:—that the party wishing to withdraw the cause from the Commissary Court, instituted this action in the Court of Session, and saying, I call upon you to withdraw the action from the Commissary Court, where the action was first commenced,—I call upon you to advocate the cause from that Court to the Court of Session, on account of this action pending in the Court of Session in the same matter. That question appears to deserve very great consideration; and it appears not to have been presented to the Lord Ordinary when he passed the bill.

My Lords,—The question here is, Whether the Court of Session had

the power which they appear to have exercised, and whether they have exercised a sound discretion by making this interlocutor; by which they have in fact done no prejudice to the appellant; for they have merely directed the cause to go back to the Lord Ordinary, to be discussed before him, not pronouncing on the merits of the case, but giving to the Lord Ordinary an opportunity of considering that, which he shews by his interlocutor of the 26th of November ought to be further considered, whether the grounds stated in the Court of Session were not sufficient to satisfy them in pronouncing the interlocutors they have pronounced. It appears to me that they, having the power, (which I think, from the reasons I have stated, they had), sufficient grounds existed in this case for their pronouncing this interlocutor, and for remitting the matter to the consideration of the very learned Ordinary. Under these circumstances, it does appear to me your Lordships ought to affirm this interlocutor; and I cannot help thinking this is, under the circumstances of the case, a very unnecessary appeal. No injustice is done to this appellant, and there is no ground for her questioning the regularity of this proceeding. And thinking there is no ground for questioning the regularity of these proceedings—and seeing, as I do, no injustice to the appellant in what was done, even if it had been irregular,—though undoubtedly, if she had any thing to complain of, she had a right to come before your Lordships to complain of that irregularity,—I must move your Lordships to affirm this interlocutor, with L. 50 costs. June 8. 1825.

Authority quoted.—Keith *v.* Grinton, July 11. 1804, (12,021.)

J. BUTT—J. RICHARDSON,—Solicitors.

J. T. and A. DOUGLAS and Company, Appellants. No. 36.

JAMES GLASSFORD, Esq. Respondent.

Entail—Implied Revocation.—A party having entailed an estate to himself 'in liferent, 'and to Henry, my eldest son now in life, in fee, and the heirs-male of his body,' whom failing, a series of substitutes, under prohibitory, irritant, and resolutive clauses, by the two latter of which he declared, that 'in case the said Henry, or any 'of the heirs of taillie,' shall do so and so, and particularly contract debt, 'then, 'and in every such case, not only shall all and every one of such acts and deeds be 'null and void, but also each and every heir or person contravening shall forfeit;' and having reserved a power to alter, and a few days thereafter executed a trust-deed in favour of Henry and others for payment of debts, so as to relieve the entailed estate, and granted power to them to borrow money, so as to carry on certain mercantile concerns in which he was engaged;—Held, (affirming the judgment of the Court of Session), 1. That Henry was included under the resolutive clause; and, 2. That the trust-deed did not revoke the prohibition in the entail against contracting debt.