

No 384.
 cessful oppo-
 sition to a bill
 of advocacion
 at the pur-
 suer's in-
 stance, ought
 to be made
 in the origi-
 nal action still
 pending, and
 not by a se-
 parate one,
 though before
 the same
 judge.

and, having opened and wrought a quarry in Fleming's ground, two several complaints of these operations were, by Alston and Fleming, preferred to the Sheriff of Lanark; and, after various procedure before him, Alston and Fleming did severally present bills of advocacion, which, after a keen litigation, were ultimately refused by the Court: For the expense of which, and likewise for damages sustained by their operations being stopped, Adam and Shaw instituted an action before the Sheriff, who having decerned for payment of the accounts given in by the pursuers, together with the expense of the present action, Alston and Fleming complained of this judgment by bill of advocacion: And the cause having been advocated, and taken to report, the Court went upon the point of form, whether it was regular to bring a new action for expenses incident in one that was still depending, and where they might be claimed, and awarded, if just.

"THE LORDS dismissed this process, reserving to insist in the original process before the Sheriff, and therein to claim the expenses."

Reporter, Kennet.

Act. M'Laurin.

Alt. Hay Campbell.

Clerk, Ross.

Fac. Col. No 1. p. 1.

S E C T. XXI.

Powers of the Lord Ordinary.

1677. January 27.

DONALDSON against RINN.

No 385.
 The Lord Or-
 dinary may
 judge of all
 that is pro-
 duced before
 litiscontesta-
 tion in modum
 probandi.

IN a reduction betwixt Donaldson and Rinn, wherein a Sheriff's decret was questioned, as wanting sufficient probation; the testimonies of the witnesses adduced before the Sheriff being produced, for satisfying of the production, and a warrant to discuss the reasons in the Outerhouse; it was *alleged* for the defender, That the Ordinary could not be Judge to the probation, but the whole Lords only. It was *answered*, That the Ordinary may, and ordinarily doth judge all that is produced before litiscontestation, though writs of the greatest intricacy or importance were produced; but if litiscontestation be made, nothing adduced for probation can be advised by the Ordinary; yea, if any thing be referred to the oath of the party at the Bar, without an act, the Ordinary takes the oath immediately, and determines accordingly; and in this case, the witnesses' oaths adduced before the Sheriff being produced before litiscontestation, and being patent to both parties, and subsumed in the reason and nullity,

and debated upon, the Ordinary may consider the reason and subsumption, and determine accordingly, wherein there is no hazard to any party; for, if the case be doubtful, the Ordinary will report; and however an amand or a bill will bring it before the whole Lords.

THE LORDS found, that the Ordinary ought to advise the testimonies of witnesses, when they are libelled upon, and produced before litiscontestation.

Fol. Dic. v. 2. p. 209. Stair, v. 2. p. 500.

*** Dirleton reports this case :

It was moved, Whether or not a decret of an inferior Judge, being questioned upon that ground of iniquity, that the libel was not proved, and the depositions of the witnesses being produced by the pursuer *ab initio*, the Lord of the Outerhouse may advise the probation, or if it ought to be advised by the whole Lords? It was found, That the depositions being produced, (as said is,) the Lord may give his own interlocutor, as upon any other writ produced *ab initio*, to instruct the libel: Though some of the Lords were of opinion, that the probation ought to be considered and advised by the hail Lords; and it was hard, that the probation being found sufficient by a competent Judge, it should be in the power of one single Lord to review the same, and find the contrary.

Clerk, Hay.

Dirleton, No 445. p. 217.

1677. June 21.

RAMSAY against AUCHINLECK.

SIR ANDREW RAMSAY having obtained a decret before the Commissaries against Auchinleck, for a bargain of victual, he suspends, and raises reduction on this reason, that the decret was null or unjust, the Commissaries having found the allegiances proved by witnesses, which did not prove; and the testimonies being produced, the question arose, Whether they shall be published to the party, and if the Ordinary should hear them debated, proved or not proved, or if they should be kept close, and advised only by the Lords, as they use to do in concluded causes?

THE LORDS found, that they should be shown to either party, and the Ordinary hear, and determine whether the Commissaries had committed injustice, in finding it proved or not, in the same way as the Ordinary can determine upon a writ produced before litiscontestation; but whatever is produced after litiscontestation, *ad modum probationis*, in a concluded cause, can only be advised and determined *in presentia*.

Fol. Dic. v. 2. p. 209. Stair, v. 2. p. 526.

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Publication of testimonies of witnesses, taken in inferior Courts, is allowed in reductions.