

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bailies of Edinburgh, for his house-mail; and, after he was decerned, he craved to be reponed; and the bailies having superseded extract for a time, that he might give in his defences, he, instead thereof, steals out an advocation, and produces it; which also contains an advocation of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

be allowed to proceed, though they erred; because there was a remedy by suspension and reduction if they did wrong. Others contended, That the Lords were the great consistory of the nation, above them, and might advocate or remit as they pleased, either simply, or with directions and instructions to the Commissaries how to proceed, as has been several times done; and though the Lords cannot confirm testaments, yet in the case of Calder of Muirton, and Monro of Foulis*, they gave directions to the Commissaries how to proceed in a competition of executors seeking to be preferred to the office; and, therefore, seeing Grange had been several years married, and had children, and was long in the possession, undisturbed and unquestioned by this Stirling's claim; and that it was dissonant to the common principles of law, to prove her marriage by her own nearest relations only; therefore they advocated the cause from the Commissaries only *quoad* that point of the hability of the witnesses, but prejudice to go on as to the other parts of the process, that being the single point complained on; which is somewhat extraordinary, to advocate as to one part and not *in totum*; but the reason of this was, that they are judges in such cases *privative*, in the first instance, except in so far as they commit iniquity. (See WITNESS.)

Fol. Dic. v. 1. p. 27. Fount. v. 2. p. 236.

1706. June 26.

JOHN and ANDREW MULLIKENS, and their Masters, Supplicants, *against* JOHN SHARP of Hoddam, and WILLIAM COPLAND of Colistoun, and JOHN M'NAUGHT, Bailie of the Regality of Terregles.

JOHN and ANDREW MULLIKENS gave in a petition, complaining against Sharp of Hoddam, and Copland of Colistoun, for proceeding to crave a decret, and John M'Naught, bailie of the regality of Terregles, for decerning in a removing against the complainers, 12th January 1706, notwithstanding of an advocacy at their instance, with a subscribed signature upon the margin, bearing that the same was, upon the 19th of May 1705, produced and admitted by the clerk.

Answered: No regard to the marginal signature, which bears not that the advocacy was judicially produced; and though it did, could only prejudice the clerk, as being but his own assertion, and not the Judge, or any other body who knew nothing of it. Nor was there any depending process the time the advocacy is alleged to have been produced and admitted.

Replied: The marginal signature subscribed by the clerk, is *probatio probata*, that the advocacy was judicially produced in a depending process: Seeing such signatures used not to be subscribed by the Judge, but only by the clerk. And if he has malversed, the judge may pursue him as accords; but being a person of public trust, his judicial signature must make faith, and be probative. Besides, it were dangerous to oblige the complainer, in such a case, to instruct, either

No 16.

Found to be contempt of authority, to proceed in a process, after the clerk had marked on the margin of the advocacy, that it was produced. The clerk's signature is *probatio probata* of the dependence of the process at the time.

* Fount. v. 1. p. 781. See JURISDICTION.