

1802. February 6.

GORDON, Petitioner.

JOHN GORDON, baker in Brechin, purchased a subject within that town from Alexander Ritchie, the Town-clerk, and the minute, expressive of the terms of this purchase, was put into the hands of David Guthrie, merchant, who purchased the adjacent property belonging to the same person; and in whose favour a servitude of free issue and entry through Gordon's property was reserved in his disposition, as well as in the one intended for Gordon; although this was not mentioned in the minute of sale.

Gordon presented a petition to the Sheriff of Forfarshire, praying that he would ordain Ritchie and Guthrie to produce the minute of sale; and "to find, in terms of it, that the petitioner is entitled to a valid and ample disposition of the foresaid subjects." The following interlocutor was pronounced, (28th November 1797:) "In respect that this process resolves into a competition as to an heritable right, the Sheriff-substitute finds it not competent for him to judge thereon."

The Sheriff-depute was of a different opinion, and decerned (24th December 1799) against the defenders.

The defenders complained by a bill of advocation; and the Lord Ordinary (1st July 1800) appointed parties to be heard upon the competency of the action before the Sheriff. Thereafter, the Lord Ordinary (13th February 1801) "advocated the cause, and assolized the defenders; reserving to the pursuer to insist in a competent action before a competent Court."

The pursuer reclaimed to the Court against this judgment, finding that his action had been incompetent, from the beginning, before the Sheriff, and that it could not be entertained upon the original petition, now that it was brought before the competent Court: But the judgment of the Lord Ordinary was "adhered to," by refusing the petition, without answers.

The cause was originally competent only by declarator before the Court of Séssion, and a summons of that kind must still be repeated by the pursuer, to make it be received there; for if it were enough that it be advocated, it would be making the defender turn it into a libel against himself, and every cause would thus be commenced before a Court whose jurisdiction could not maintain, nor its forms suit it. Proof might be taken by order of a person who had no power, and the previous steps directed by one ignorant of the matter in dispute, and then all these irregular proceedings would be removed into the Court of Session by advocation, by which form, improper and irregular proceedings must be the ground of the decision of the Court, and would be held to be thus recognised by their authority, although they might be little calculated to settle the subject of dispute.

Lord Ordinary, *Armadale*.For the Petitioner, *Gillies*.
Clerk, *Menzies*.Agent, *W. Inglis, W. S.*

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A cause brought before an incompetent Court cannot be removed into the Court of Session by advocation, and discussed there.