

1634. *March 8.*CHARTERS *against* MYLES.

No 6.

A decree
found null,
pronounced
after advoca-
tion.

IN an action moved before the Commissary of Brechin, where the pursuit being referred to the defender's oath, and he summoned to that effect, at the which day of compearance, the defender producing the Lords letters of advocation, discharging the Commissary; and the pursuer instantly producing horning against the defender, whereby he debarred him to produce that advocation, or to compear in the cause against the defender; and whereupon the Commissary proceeded, and decerned in the cause against the defender, as debarred with horning: This decret being suspended, as done and pronounced *spreto mandato judicis*, and so is null; and the other maintaining the decree, as a sentence standing, and also as lawfully given against the defender, now suspender, seeing he was debarred by horning, and so could not use advocation:—THE LORDS found the decret evil given, and that the same was null, seeing the advocation was produced to the judge, before the horning was produced; and that the judge ought not to have proceeded, the advocation being produced to him before the sentence; and the LORDS reponed the suspender to all his defences, and ordained them to dispute presently in this place, upon the principal cause, as if no sentence were given.

*Ast. Mowat.**Alt. Ruffel.**Durie, p. 719.*1662. *July 13.*LAIRD of Lammertoun *against* HUME of Kames.

No 7.

An advoca-
tion cannot
be received,
after sen-
tence, though
before ex-
tract.

HUME of Kames being infeft upon an apprising of the lands of Northfield, led against Lamertoun, pursues the tenants for mails and duties, and obtains decret; which was suspended, and reduction thereof raised on this reason, That it was *spreta auctoritate judicis*, there being an advocation judicially produced, before the Sheriff, before pronouncing, at least before the extracting of this decret, in so far as the suspender came to the Sheriff-court, at the ordinary time of the court-day, at eleven hours, and produced the advocation; but the Sheriff had sitten down that day, contrary his custom, at ten hours, and had pronounced the decret before eleven hours.—The charger *answered non relevat*, That the advocation was produced before extract, not being before sentence pronounced; because, albeit inferior judges are accustomed sometimes to stop their own decreets, after they are pronounced, before extracting, yet *sententia definitiva, est ultimus actus judicis*, and the extract is but the clerk's part, so that it can be no contempt, albeit the judge would not prohibit the extract; and as to the other member, that the Sheriff sat his court an hour before the ordinary time, *non relevat*, unless he did it of purpose, to anticipate this advocation.

THE LORDS found the first member of the reason, that the advocation was produced before extract, after sentence, *non relevat*; and as to the other member,