

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

No 6.

A decree found null, pronounced after advocacy.

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 advocacy, discharging the Commissary; and the pursuer instantly producing horning against the defender, whereby he debarred him to produce that advocacy, 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 advocacy:—THE LORDS found the decret evil given, and that the same was null, seeing the advocacy was produced to the judge, before the horning was produced; and that the judge ought not to have proceeded, the advocacy 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. 710.*1662. *July 10.*LAIRD of Lammertoun *against* HUME of Kames.

No 7.

An advocacy cannot be received, after sentence, though before extract.

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 advocacy 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 advocacy; 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 advocacy 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 advocacy.

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

they found it relevant; as it is circumstantiate, to infer that it was done of purpose to anticipate the advocacy, without necessity to prove otherways the purpose, and in that case declared, if the same were proven, they would turn the decret in a libel.

No 7.

Fol. Dic. v. I. p. 26. Stair, v. I. p. 123.

1666. February 20. — against HUGH M'CULLOCH.

THE laird of Balnigoun being arrested in Edinburgh, for a debt due to a burgess, Hugh M'Culloch became caution for him in these terms, That he should present him to the diets of process, and should make payment of what should be decerned against him, if he did not produce him, within terms of law, *pedente lite*. Balnigoun raises advocacy, and at the same diet that the advocacy was produced judicially before the bailies, Hugh M'Culloch also produced Balnigoun, and protested to be free of his bond as cautioner. The bailies did not incarcerate Balnigoun, but refused to liberate Hugh M'Culloch, till they saw the event of the advocacy. The cause being advocate, and decerned against Balnigoun, who succumbed in an allegiance of payment; the pursuer craved sentence against him, and Hugh M'Culloch his cautioner.—It was answered for Hugh M'Culloch, That he was free, because he had fulfilled his bond, in presenting Balnigoun, and protesting to be free, albeit the bailies did not free him, that was their fault.—It was answered, That the advocacy being raised, hindered the bailies to incarcerate, because they might not proceed after the advocacy; and therefore the cautionry behoved to stand, otherwise all acts of caution, to answer as law will, might be so elided.

THE LORDS found the cautioner free; and found that the bailies, notwithstanding of the advocacy, might incarcerate the principal party, unless he had found new caution; for, seeing if he had found no caution, *a principio*, but had been incarcerate till the cause had been discussed, the advocacy would not have liberate him; and whensoever the cautioner produced him judicially, and protested to be free, he was in the same case as if he had been incarcerate, and therefore the bailies might have detained him in prison, notwithstanding of the advocacy, which did fitt the cause.

Fol. Dic. v. I. p. 27. Stair, v. I. p. 360.

1675. June 8.

THE LORDS yesterday did order, That in regard of the great abuse in desiring and granting advocations so frequently from inferior courts, to the great prejudice of the people, and the retarding and delaying justice; that therefore the

No 8.
After advocacy was admitted, the cautioner *judicis fitti*, having judicially produced the defender; Found the party might warrantably be imprisoned by the bailies, notwithstanding of the advocacy.

No 9.
The Lord Ordinary might refuse advocacy, but ought to