

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

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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

No 9.
report to the
Court before
passing a bill.

Ordinary upon the bills may refuse to pass advocations, if he find cause; but that he ought to report all advocations before they be pass to the whole Lords.

Fol. Dic. v. 1. p. 26. Dirleton, No 260. p. 126.

1675. June 8.

KYLE *against* GRAY.

No 10.
Advocation
cannot be
pass of fums
under 200
merks, for
any reason of
iniquity.

THIS day the LORDS found, That advocations for fums of money within 200 merks, could not be pass upon any reason of iniquity.

Some of the LORDS in the case foresaid were of opinion, That advocations should not pass, though the process had been for a sum above 200 merks; because litifcontestation had been made in the cause; and after litifcontestation there can be no iniquity but by a decret, which ought to be suspended without advocation.

Castlehill, Reporter.

Fol. Dic. v. 1. p. 26. Dirleton, No 261. p. 126.

1676. December 12.

MARSHALL *against* HOLMES.

No 11.
An advoca-
tion produced
after decree
pronounc-
ed, but before
it was reduc-
ed into writ-
ing, rendered
the decree
null, as being
*spreto man-
dato.*

AN advocation being produced, after the judge had decerned, but before he had cleared and dictated the minute of the decret; which he did upon the Bench, immediately after production of the advocation:

THE LORDS found the decret null, as being *spreto mandato*; but in respect of the circumstances, and that the judge had decerned before, as said is, they turned it in a libel.

Thefaurer-depute, Reporter.

Gibson Clerk.

Fol. Dic. v. 1. p. 27. Dirleton, No 396. p. 195.

* * * Stair thus reports the same case:

CHRISTIAN HOLMES having obtained decret against John Marshall, before the Sheriff of Lanark; he suspends and raises reduction on this reason, that the decret is null, being *spreto mandato judicis* of the Lords, after an advocation produced judicially.—It was *answered, non relevat*, because the decret was pronounced before the advocation was produced.—It was *replied*, That by an instrument produced, taken judicially in the hands of the Clerk of Court, and subscribed by him, it is instructed, That the sheriff-depute, immediately after the calling of that cause, did only express generally, Decerns; and immediately after the advocation was produced, he did dictate the sentence to the clerk; so that before the judge was *functus officio*, by expressing the special tenor of the decret, the advocation being produced, the decret is simply null, as *spreto mandato*, and cannot be sustained, even as to the libel thereof, which is sometimes done by the Lords *ex gratia* in null decreets, but never in those that are *spreto mandato*.