

No 3.

1582. November.

HOME against HOMES.

An advoca-
tion being
produced for
a party be-
fore the in-
ferior court,
and the other
party offering
to debar him
from produ-
cing by a re-
gistered horn-
ing, and the
judge there-
upon giving
sentence
without re-
gard to the
advocation,
the Lords re-
duced the
sentence as
given *spreto*
mandato.

JAMES, DAVID, and ANDREW HOMES, brothers of the house of Lochtillo, were pursued by Alexander Home of Prendergaist before the Sheriff of Langtoun, to flit and remove from certain lands; in the meantime, and before the giving of the said decret into the said action, the said brothers produced before the Judge, letters direct from the Lords of Session, to hear and see the matter advocated, *et interea* to discharge the said Sheriff and his deutes from all further proceeding. The Sheriff, nevertheless, proceeded, and gave decret *condeminator*; *igitur dicti fratres* meant them again to the Lords of Session, and desired *absque ordinaria via reductionis* to be reponed again *tanquam a decreto a non suo iudice lato*. It was answered, That the Sheriff did no wrong in giving of the said decret *non obstan.* of the said discharge which was intimated to him, and he sufficiently certiorate of the same, because the said brothers, at whose instance the letters of advocation, with the discharge therein contained, were all the King's rebels, and at the horn for a slaughter, as the letters of horning bear, which were produced before the Sheriff, and so the brothers had no place to stand in judgment, and merited no benefit of the law. To the which it was answered, That albeit the party was rebel, and had no place to stand in judgment, yet not the less the LORDS ought to have been obeyed, and the letters that proceeded from them; and in so far as the Sheriff did proceed and give process, being discharged by the LORDS, he did wrong. The matter, with great contentation, being reasoned among the LORDS, some were of the opinion, that albeit the party was at the horn, yet he might have sought advocation, as a party being at the horn may force suspension and relaxation; others were of the contrary opinion, that in so faras the said brothers were the King's rebels, and for a capital crime of slaughter, that neither the LORDS, nor yet the Sheriff, or any inferior judge, could have shewn to them any favour, and that they had no place to stand in judgment, and were not capable of any benefit of the law, *quia fuerunt infami de jure et de facto, et sic non habuerunt personam in iudicio standi prout in L. 6. D. De iis qui notantur infamia.* THE LORDS pronounced, by interlocutor, that the Sheriff had done wrong, in so far as he obeyed not the LORDS' letters, and that process should have been given to the parties, albeit they were at the horn in this case, and so ordained the said brothers to be reponed again into their own place, notwithstanding of the decret given by the Sheriff, because, after he was discharged, it was *tanquam decretum a non suo iudice latum.* *Bona pars dominorum in contraria fuerunt opinione.*

Fol. Dic. v. 2. p. 85. Colvil, MS. p. 340.

* * * A similar decision was pronounced, 8th March 1634, Charteris against Myles, No 6. p. 368, *voce* ADVOCATION.