1623. *July* 18. CRANSTON *against* HUME of Slegden.

No 4.
A ſervice being advocated from an inferior judge to the macers, all other judges were thereby found prohibited to ſerve, though not mentioned in the advocation.

IN an action for exhibition and delivery of a tack, purſued at the inſtance of James Cranſton, aſſignee to John Hume, who was ſerved general heir to him, to whom the tack was ſet, viz. To the E. of Dunbar, againſt John Hume of Slegden, as heir of conqueiſh to Sir George Hume of Manderſton; for inſtructing of the purſuer's title, the retour was produced, whereby the ſaid John Hume was ſerved heir, before the Sheriff of Roxburgh, to the defunct; which retour the LORDS found null *ope exceptionis*, becauſe it was *alleged*, That before that ſervice, there was advocation raiſed at the inſtance of the oye of the E. of Dunbar, for advocating of the brieves, whereby the ſaid John Hume deſired to be ſerved general heir to him, before the bailie of Lauderdale; by the which advocation, not only was the bailie of Lauderdale diſcharged, but alſo the ſaid John Hume, purchaſer of the brieves, was diſcharged and ſummoned, he being perſonally diſcharged to proſecute the ſaid brieves, impetrate to be ſerved before the ſaid bailie, as the advocation ſhewn to the Lords bore; which the LORDS found to make the retour null, ſummarly by way of exception; albeit the party *replied*, That his retour being a ſentence ſtanding, could not be found null, but by way of reduction; and alſo that the advocation could not be of that force; for albeit it ſhould be here received and diſputed, as in a reduction, to annul the retour, ſeeing by the advocation, the brieves to be ſerved, before the bailie of Lauderdale, were only advocate, and that judge only diſcharged; ſo that the intimation made to the party, of the diſcharge of the particular brieves, to be ſerved before that judge, could never be of force, to ſtay him to proſecute, or to intent a ſervice before another judge, of whom no mention is made in the advocation; and the party inſiſting therein after that diſcharge, cannot be found to be done *ſpreto mandato judicis*, ſeeing that command was obeyed, the purſuer never having impetrate any ſuch brieves before that judge at any time; and the diſcharge cannot be further extended than it bears, nor enlarged beyond that which the party's ſelf fought, who craved not the purſuer to be diſcharged of all ſerving of himſelf heir before any other judge, as he might have done, and would have been alſo granted, if there had been found any reaſon for the ſame; and ſo he omitting to ſeek the ordinary remeid, that advocation, as it is craved and granted, cannot be obtruded to annul his ſervice, eſpecially, regard being had to this, that the advocation of brieves is not allowable, neither is there any relevant cauſe ſet down in the advocation, whereby the brieves could have been impeded to be ſerved.—— Which anſwer was repelled by the LORDS, ſeeing they found, after that the party was perſonally diſcharged, albeit to proceed before one judge, yet it was not lawful for him to proceed or ſerve thereafter before any other, except the party who raiſed that advocation, had been warned thereto; but the ſervice of

the brieves thereafter was eluſorie of the former diſcharge, and was deduced *ſpreto mandato*, and therefore null. No 4.

Act. *Ayton, Stuart & Craig.* Alt. *Hope & Nicolſon.* Clerk, *Gibſon.*

Fol. Dic. v. 1. *p.* 27. *Durie, p.* 74.

1627. *July* 18. GAVIN STEWART *againſt* his PARISHIONERS.

No 5.
A decree of an inferior court ſuſtained, after letters and ſummons of advocation, executed againſt the party, but not againſt the judge.

IN a ſuſpenſion betwixt *contra* , a decreet being quarrelled as null, becauſe it was pronounced and dated after the cauſe therein contained, was by the Lords' letters and ſummons of advocation advocated, and after the party obtainer thereof, was ſummoned by the ſaid ſummons of advocation, to compear before the Lords, and albeit the judge was not diſcharged to proceed, whereby it might be alleged he was in probable ignorance of the advocation, and ſo might lawfully proceed in the cauſe, the advocation thereof never being intimate to him; yet the ſuſpender *alleged*, That that could furniſh no excuſe to the party, who knew of the advocation, and who, after the ſame was intimate to him by citation, as ſaid is, can never be found to have done *bona fide*, in inſiſting in that action before the judge thereafter; but the decreet ought to be found null, as done and inſiſted on by him *contra mandatum judicis*, which he could not misknow. This reaſon was not ſuſtained; but the decreet was approven, notwithſtanding of the advocation and citation of the party, obtainer thereof, ſeeing the judge was not diſcharged, who not being acquainted legally with the advocation, cannot be repute to have contemned the authority of the Lords.

Fol. Dic. v. 1. *p.* 27; *Durie, p.* 311.

*** Spottiſwood reports this caſe thus:

Mr Gavin Stewart having obtained a decreet againſt his pariſhioners of Dalmellington, before the Commiſſary of Glaſgow; they ſuſpended upon this reaſon, That the decreet was given *ſpreto mandato judicis*, they having raiſed an advocation before the giving thereof, the party cited and the Commiſſary and clerk ſummoned.—*Anſwered*, That if any advocation was raiſed, the ſame was never intimate to the judge ſitting in judgment, but only at his dwelling-houſe.—— THE LORDS, in reſpect that the Commiſſary and party were both in *bona fide* to proceed, the judge not being diſcharged in judgment, found the letters orderly proceeded.

Spottiſwood, (ADVOCATION.) *p.* 11.