the decreet was to be pronounced, without prorogation;—the defender ALLEGED Absolvitor; because, *pendente processu*, the pursuer had invaded him, by beating, wounding, &c. conform to the Act of Parliament made thereanent; whereby the pursuer *cadet causa*.

The Lords sustained the defence.

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1678. *November* 16. The LAIRD of CUNNINGHAME-HEAD *against* The EARL of LOWDON.

CUNNINGHAME-HEAD,—having had a joint right to the estate of Lowdon, by the first apprising thereof, at the instance of Mr Livingstoun, which is now expired,—did obtain decreet, against the tenants, for his share of every tenant's duty, effeiring to his share of the principal sum in Livingstoun's apprising. There is a bill of suspension of the decreet given in; and the cause ordained to be discussed upon the bill.

It was ALLEGED for the tenants, That they were or might be distressed by several rights preferable to Mr Livingstoun's; which were now produced.

It was ANSWERED, That this decreet proceeded upon suspension of multiplepoinding, whereupon the parties now competing were cited, and did not appear; and, therefore, they cannot now be heard in the second instance, in respect of the Act of Parliament anent doublepoinding.

It was REPLIED, That that Act was only for actions of doublepoinding; but not for suspensions, which must be instantly verified: and, therefore, though the parties omit to produce, they cannot be excluded to produce again in a second doublepoinding, either by way of action or suspension.

The Lords found, That the Act anent doublepoinding did not extend to suspensions of doublepoindings; and, therefore, allowed those who were cited in the first suspension of doublepoinding, and produced not, to produce now in the second suspension, and to compete therein.

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1678. *November* 27. RUSSEL *against* RUSSEL.

THERE being mutual actions of molestations between Russels and Russels, in relation to lands lying upon the borders of the shires of Lanerk and Linlithgow, before the Sheriff of Lanerk; the Sheriff appointed a perambulation, and named an inquest; and, at the first meeting of the perambulation, prorogated the same to a diet. Some months after, Russel in Linlithgow-shire raised advocation on these reasons:—1*mo*. That, by express Act of Parliament, Molestations betwixt heritors of lands in different shires are ordained to be by the Lords, or by indifferent persons commissioned by them; and the inquests meeting on the ground, their diets are not to be continued beyond eight days; whereas, here they were continued for some months. 2*do*. The sheriff of Lanerk is suspected as interested to enlarge his own jurisdiction; for, if the land in question be found to

be part and pertinent of the tenement belonging to the Russels in Lanerkshire, it will be in the sheriff of Lanerk's jurisdiction.

It was ANSWERED to the first, That *primus actus judicii est judicis approbatorius* :—both parties having pursued before the sheriff of Lanerk, cannot now decline him as incompetent. And, as to the prorogation of the inquest, it was of consent of both parties, as the Act bears. Neither is a reason of suspicion competent after an Act of Perambulation, and an inquest chosen out of the lists offered by both parties; which makes litiscontestation in perambulations: after which nothing but iniquity can advocate.

It was REPLIED, That though the pursuer of the advocation did compear before the sheriff of Lanerk, yet the Act bears,—That he protested that he was not under his jurisdiction, and did proceed under that protestation: neither can the sheriff's act, bearing his consent, prove, unless it had been subscribed.

It was DUPLIED, That proponing defences, or offering members of inquest, and compearing at the diet of inquest, are all acts approbatory of the sheriff's jurisdiction; and any protestation in the contrary, is inconsistent, *et contraria facto*: Neither is there necessity to subscribe any consent in matters ordinary incident in processes; as assigning and ordaining of diets.

The Lords repelled the first reason; and found the appearance and insisting excluded declinator, notwithstanding of any protestation in the contrary: and found the consent to the continuing the diets without writ sufficiently proven, by the Act of the Court, without consent of the party; and that, after nomination of the inquest upon the lists of both parties, suspicion of the judge was not competent.

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1678. *November* 30. GRANT of CORIMONY *against* M'KENZIE of SUDDY.

GRANT of Corimony having obtained a decreet of spuilyie against Grahame of Drynie and M'Kenzie of Suddy, they suspend, and raise reduction, on this reason :—

That, by inspection of the testimonies, it would appear that there was no probation of any part of the spuilyie, against them, and no probation of a spuilyie of a mare against any; and therefore the decreet is null for want of probation.

The charger ANSWERED, That the reason is no ways competent to be founded upon probation by witnesses; which, by the inviolable custom of this kingdom, are never to be published and seen to any party; but are to be sealed after they are taken, and sealed after they are advised: And, therefore, the Lords suffer not advocates to allege *super dictis testium*; which, by our law, are *partes judicis*, and the trust of the Lords: and, therefore, can be advised only by the Lords *in præsentia*; albeit the most important writs produced, before conclusion of the cause, may be determined by the Ordinary. And this custom of closing of testimonies is founded upon solid grounds and expediency, which immemorial experience hath confirmed: that the debating of the importance of every testimony, whereof, perhaps, a hundred may be in one cause, would make pleas endless; and the publishing thereof would beget animosities against witnesses, and weaken the freedom of their depositions, when powerful persons, or their friends,