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,

were concerned: and the closing of witnesses is a considerable part of our law, by immemorial custom; which nothing can alter but a statute in Parliament. It is true that there is an exception in improbations, the consequence whereof is capital: for, upon the decreets of improbations, finding a writ forged, and a party actor, or accessory to the forgery, the justices and assizes do currently proceed to find the party guilty, without further proof: But there is no other exception in civil cases, *et exceptio firmat regulam in non exceptis:* neither have the Lords, after advising of testimonies, upon any importunity, readvised the same; knowing that they would ordinarily be put to double or frequent advisings. But, after sentence extracted, none did ever attempt to allege a decreet of the Lords null, because the testimonies of the witnesses did not prove; which could neither have ground nor effect without publication of the testimonies: for the Lords did never regard the pretence of parties, that the witnesses had told them what was their testimonies; they being ready to gratify either party by such extrajudicial assertions.

The suspenders ANSWERED, That albeit, in the first instance, the Lords would not allow publication of testimonies, or readvise the same, yet they ought to do the same in the second instance: as they will not stop process upon reprobators, yet they will reduce their most solemn decreets upon reprobators: they will also reduce their decreets upon nullities, for want of probation: And there is reason they should revise the testimonies upon reduction; because, for want of publication of testimonies in the first instance, decreets founded thereon are, in effect, in absence *parte inaudita.* And, for the inconvenience of multiplying pleas, the Lords may let the first decreet take effect, without granting suspension; but ought to admit of reduction: for,—seeing sentences are not subscribed by the President, but are mere minutes of the clerk upon the process, which the Lords do not nor cannot know how or when they write them,—parties, without reflecting upon the justice, or trust of the Lords, but only upon the faithfulness of the clerks, may well desire the Lords to revise the probation. And, in this case, Mr John Hay, who was clerk, and who was accused for malversation in this process, was never acquitted, but did resile therefrom.

It was REPLIED, That this pretence is, under the name of a clerk, to strike at the justice and trust of the Lords, and the ancient law of closing of testimonies; for, if it be allowed, all the decreets of Session that ever were, or can be, may be drawn in question, and there can be no ultimate sentence by probation of witnesses; for still that reason remains, The clerk might have made up the sentence, produced false testimonies, or suppressed the true, or read otherwise than was written, or write otherwise than was ordered. Therefore, such improbable possibilities, which wound the common confidence in all judicatures and their servants, are neither relevant nor presumed; but, on the contrary, it is a received principle in all nations, *res judicata pro veritate habetur:* and parties have all the rational remeid that can conveniently be, before sentence; for they are called *in præsentia* at advising of causes, and, in their presence, the clerk relates the state of the process, and what is adduced for probation, and, if they suspect him, they may desire him to be special upon the number and names of the witnesses, and, if any be omitted to be presented who were examined, they will be heard thereupon. And, albeit the Lords reduce their own decreets upon nullity, when it appears by the decreet, it doth not mention all the points admitted to probation to have been proven, by expressing the manner of probation; when by

oath, by writ, or witnesses; and bearing the points to be sufficiently proven by the writs produced, which are expressed in the production, or by the oath of the party, or by the testimony of famous witnesses, if these be omitted; which pass in course, and are not particularly advised by the Lords:—but that infers nothing as to the particulars advised by the Lords; for albeit, when parties are absent, the clerks give sentence, of course, in matters clear, or in others do report the libel to the Lords, who give their interlocutor, without full inspection of the libel, or probation by writ, and will, in the second instance, hear parties who were absent in the first, upon the relevancy, or probation by writ or oath, yet never upon that point, whether the testimonies, even in absence, did prove, seeing these cannot be published. And therefore the Lords do narrowly advert thereto in all cases: as this very day, in a contravention inferred by the violence of a son in the family, the Lords would not admit a contrary probation, that he was a schoolmaster *extra familiam:* nor would they reëxamine the witnesses adduced, what they meant by being in the family, whether he was only in the house for the time, or if he resided with his father; seeing they bore, that he was in his father's family and household.

The Lords found the reason of reduction, That the testimonies adduced proved not, was not competent; and therefore would not revise nor reconsider the testimonies, but adhered to the decreet, and found the letters orderly proceeded.—[*See page* 237.] *Vol. II, Page* 650.

1678. *December* 6. MR WILLIAM WEIR *against* EDWARD RUTHVEN.

MR William Weir, as assignee, by Patrick Ker, to a bond granted by the deceased Earl of Bramfoord, of 5000 merks, pursues a declarator against Edward Ruthven, that the Earl having been forefault during the troubles, his forefaulture was rescinded, and his estate established in the person of Edward Ruthven, his grandchild, by his eldest daughter the Lady Forrester; that therefore the estate of the Earl should be affected with this debt, by apprising or adjudication.

The defender ALLEGED Absolvitor; because, by a special Act of Parliament, his grandfather's estate was established in him, without mention of his debt, so that, in effect, he was made donatar to his grandfather's forefaulture; and it is sure, the king or his donatar is liable for no debt, unless it had been perfected by infeftment or confirmation from the king.

The pursuer answered, That there was no gift of forefaulture, which could only be given by the king. But it is clear, by the Act, that the Earl was restored, not by way of grace, but by justice, as having been unjustly forefault for those acts which he did by the king's command, as a loyal subject. And though the Parliament, by a special Act, qualifying the restitution, to preserve the Earl's memory and estate, which would have fallen to his two daughters, and settled the same in the person of Edward, his grandchild, and ordained him to take the name of Ruthven; yet the settling of an estate in this manner, extending both to the Earl's real and personal estate, can never be understood with exclusion of his debt, unless it had been so expressed, it being contrary to material justice: But the settling of an estate being *nomen universitatis*, not by way of gift, but by way of justice, must be understood *cum suo onere*.