this case, I think, if the defenders did make offer to fulfill their part of the contract, the Lords will ordain the pursuer to adhere to the contract, and will never annul the same. *Advocates' MS. No.* 65, *folio* 80.

1670. *July* 8. Anent PURSUERS DELAYING TO INSIST.

WHERE a pursuer in an ordinary action, or a charger in a suspension, defers and refuses to insist; the most effectual way to force them is by raising a summons narrating the action or charge, charging the pursuer to insist; with certification, if he do not insist, he shall never be heard thereafter to insist in that action; and the protestations put up for not insisting, or decreets suspending the letters ay and while the charge be produced, are but elusory. *Ita Norvell.*

Advocates' MS. No. 66, *folio* 80.

1670. *July* 8. SIR GEORGE LOCKHART *against* JAMES STEWART.

IT was contraverted betwixt Sir George Lockhart, and James Stewart, if a messenger, as judge to the formality and leading of apprising, can adjourn or continue the diet of the apprising from one day to another. Sir George, Sir Robert Sinclair, and many others, thought he had no such power, since the diet and citation of the defender to see the comprising led on such a day was peremptory, not bearing "with continuation of days," and otherways comprisings (which of themselves are most solemn and public acts) should be all carried on clandestinely: yet thought he might prorogate upon urgent necessity, or on just and lawful causes, or where there were impediments why he could not keep that day; yea, Sir Robert called it a novelty or heresy in law, to say he could continue; and thought any comprising that bore any such adjournment was *ipso facto* null. Yet James Stewart, and Mr. George Norvell, had seen such comprisings, and alleged that any ordinary jurisdiction in Scotland might prorogate, but such was the messengers', they being appointed by the acts of Parliament judges to comprisings; and such adjournments are ever done *periculo petentis*, and if any be lesed thereby, they have a remedy, *viz.* to complain to the Lords. *Vide infra Num.* 216. [12 *July* 1671, *M'Pherson* against *Murray.*]

Advocates' MS. No. 67, *folio* 80.

1670. *July* 9. LIDDELL *against* SIR DAVID OGILBIE.

THE deceased Laird of Cullene being about to marry his daughter on Raploch's son, writes in to this Liddell, merchant in Edinburgh, desiring him to send him some velvets and other silks, &c. and obliges him to repay him thankfully; which

Liddell does. Then Cullene dies. Liddell pursues his Lady as executrix to her husband, to pay the price of the ware furnished, conform to her husband's obligatory letter; and recovers decreet. On which he charges the Lady and Sir David, now her husband, *pro interesse;* who suspend on this reason, that the letter, which was the ground of the decreet recovered against her, having miscarried, so that the charger cannot now show the same, they cannot safely pay the sum; seeing in their tutor counts with young Cullene this sum contained in this decreet will not be allowed them, unless they can produce the letter, or say that in the decreet given against the lady, Cullene was also called.

To the which it was ANSWERED,—That the decreet bearing it was given on that letter will be sufficient exoneration to Sir David, and will ever produce allowance to him of that sum, when he comes to count with his pupil; for a decreet bearing the production of a letter, bond, or any other writ, or bearing that it proceeded upon such or such writs, which were seen then by the judge, it is *probatio probata*, though that these writs cannot be now shown.

REPLIED,—That a decreet, except the verifications thereof were assigned to him, will never infer exoneration to Sir David, nor work him relief against Cullene; seeing Cullene will say this decreet is *nihil ad me*, it is *res inter alios acta*, I was not called to it, and so cannot prejudge me, or bind that debt of my father's on me; and, therefore, if Cullene and his tutors will but declare that he shall allow to this suspender the sum contained in the decreet, he will presently make payment of it.

This was found relevant.

Charger, Wallace. *Alt.* Lockhart and Falconer.

Advocates' MS. No. 68, *folio* 80.

1670. *July* 9. SANDILANDS *against* CLERK and WALKER.

THIS was a reduction of a decreet of the admiral, whereby the admiral had decerned this pursuer (as he who had bought the ship,) to pay 500 dollars as the fraught convened upon betwixt the skipper and Sandilands his author, of the ship to the skipper, upon this reason of iniquity, That albeit by the laws and customs of all Admiralty Courts in the world, *omnia invecta in navem* are *tacite* hypothecated to the skipper for his fraught, so that he has *jus retentionis ratione tacitæ istius hypothecæ* of the whole goods fraughted in the ship, that either he may detain them in the ship, or hinder them from being transported off the shore, till such time as he be paid of his fraught; but it is againt all law or reason for any man to think or say that he should have any real right of hypothecation in the ship itself, so that it shall not be leasum to the several owners of the ship to sell their parts of it till the skipper be first satisfied of the fraught, or if they do, that the ship is transmitted with the clog and burden of a hypothec for the fraught.

ANSWERED,—That where the fraughter is a stranger, that has no interest in the ship, in that case indeed the skipper has only an hypothec in the goods that are in the ship, and not at all in the ship itself; but where he is not an extraneous par-