1675. *July* 21. CHIESLY *against* BAILLIE.

No 644.
In a cognition of marches it was found, that the verdict of an inquest, where there was much dubiety, ought not to be relied upon; and the Lords determined to revise the proof which had been led before the Sheriff.

SIR JOHN CHIESLY having acquired the lands of Shiells, which lie adjacent to the lands of Elsriggle and Dolphington, belonging to ——— Baillie of Walstoun; upon the march of the lands there is a piece of marshy ground, which was drained by Walstoun, and became meadow; Sir John Chiesly alleging right to this marshy ground, as pertinent to his land, pursued a cognition before the Sheriff; Walstoun did also pursue another; and there being an inquest called upon the ground, upon both parties' process, they did both compear, and cast lots for the odd-man of the inquest, which fell to Walstoun, who thereupon chose eight of the persons cited to be upon the inquest, and Sir John Chiesly seven; there were three witnesses examined for either party, and two common witnesses for both: The inquest were inclosed, and perused the testimonies, and six of the persons of the inquest that were chosen by Sir John found and voted, that the controverted ground was common to both parties: The eight that were chosen for Walstoun voted *non liquet;* and seeing there was no equality, the Chancellor could not vote. The Sheriff refused to give out decreet upon this verdict; whereupon Sir John Chiesly presented a bill of advocation, to which Walstoun having given answer, the Lords advocated the cause, and ordained the processes to be produced, and the parties heard thereupon in their own presence presently. The cause being now called, it was *alleged* for Sir John Chiesly, That the Sheriff had done wrong in refusing to pronounce decreet, cognoscing the controverted ground to be common to both parties; because six of the inquest having voted for commonty, the other eight being *non liquet*, who, because of their unclearness, voted neither commonty nor property, the verdict was certainly for commonty; because, the members that are not clear make up the quorum, but make no votes; and, therefore, six becomes the plurality of votes, though not the plurality of the members of inquest, otherways there could never be a verdict or sentence in the case; for the inquest being a kind of judicature, having power to judge in the probation, and having sworn *de fideli*, it must be presumed that they voted according to their opinion, and so were unclear whether it was property or commonty, and could not be compelled to vote otherways than according to their judgment: For, albeit by the law of England, the inquest may be inclosed, and kept from meat and drink, till all of them agree; yet we have no such law nor custom, nor were it reasonable to introduce it, to compel parties to vote against their judgment. 2*do*, If these votes import not a verdict, the Lords, as the Supreme Inquest, ought to supply their place, and the place of the Sheriff, and, therefore, ought to advise the probation, and pronounce decreet of cognition, according to what they think proved. It was *answered* for Walstoun, That there could be here no verdict, but he hath raised a declarator of property, and offers to prove property, and is content of a new visitation by the Lords, and that

witnesses be received *hinc inde*; and though the Lords should advise the testimonies produced, yet seeing so few witnesses were admitted, and that the inquest was so unclear, and seeing the inquest being upon the ground, might have proceeded upon their proper knowledge, there ought now to be allowed more witnesses to either party for clearing the matter: And seeing the verdict of an inquest doth ordinarily bear, *qui jurati dicunt*, this cannot be understood, unless either the whole jurors, or the major part by vote were *affirmative*; for, in no sense can six make the sentence of fifteen; otherways, when in criminal ditties an assize should so vote, that six were for condemning the pannel, and eight were *non liquet*, the pannel should be condemned; whereas, they that are *non liquet* condemn not, but assoilzie: And the custom of England, from which we have inquests, is so far from resting on the minor part, that it forces all of them to agree; so that it was the Sheriff's fault, that he did not allow the persons that were unclear to deliberate, and appoint another day for them to give their clear votes, which ought yet to be done. It was *replied*, That where the question in an inquest is, Guilty or Not Guilty, all that condemn not do assoilzie; and so, *in favorem rei et vitæ*, the *non liquets* make for the liberation of the pannel: But before this inquest the question was, Proved or Not Proved; but the piece of land in question being, beyond doubt belonging in property to one of the parties, or in commonty to both, the question to be determined by the vote was, Commonty or Property. In which case, those who were *non liquet* voted for neither party; so that their presence made the quorum, and their votes made nothing; and if it were considered, whether this inquest was more for property than commonty, it could not be denied but they were more for commonty, which, therefore, should be their verdict; for if the fifteen Lords should vote that same way, though the *non liquets* were allowed another day to deliberate, yet if they should continue to be *non liquet*, the minor part would make the sentence, or else such a case should remain for ever undeterminable. It was *duplied*, That, albeit in such a case, the minor part of the Lords would preponderate and make the sentence, because they are the Supreme Court ordinary in civil causes, yet inquests being both subordinate to the Sheriffs and to the Lords, such a verdict of theirs should not be rested on. No. 644.

THE LORDS found, that the verdict of the inquest ought not to be rested upon, but that the Lords would advise the probation; and that the matter might be fully clear, allowed five witnesses to either party, to be adduced before the Lords.

Fol. Dic. v. 2. p. 271. Stair, v. 2. p. 356.

*** Gosford reports this case:

1675. *July* 20.—THERE being letters of cognition directed to the Sheriff of Lanark, and a reconvention raised at Walstoun's instance, before that same Sheriff, for cognoscing certain lands, if they were commonty or property, which

No 644. was the question betwixt the pursuer and defender; there being an inquest chosen, and Walstoun, by lot, getting eight of the inquest to be for him, and seven for Sir John; after several witnesses were examined for both parties, there being a Chancellor chosen, six of them did only give their positive vote, and eight did vote upon liquid; so that there was no place for the Chancellor to give his vote; and the Sheriff refused to give his sentence; whereupon a bill of advocation being given in, and the cause being advocated, it was *alleged* for Walstoun, That the cause ought to be remitted to the Sheriff; and there being eight of the votes *non liquet*, the Sheriff ought to be ordained to give sentence for him, seeing the major part of the inquest being *non liquet*, their votes did make for him; and Sir John could claim no commonty in the lands controverted, because, where there are many persons to be judges in one cause, the major part being *non liquet* as to the probation of any matter of fact, it doth clearly make against the other party, who can never have a sentence given for him, albeit a fewer number be of another opinion, and positive. It was *answered*, That all those of the inquest who were *non liquets* being of Walstoun's own nomination, and refusing to be positive in their vote, could not be any ground of a sentence for him. The Lords did find, that the major part of the inquest being *non liquets*, any verdict that they could give was null, and could not be the ground of any sentence: And in respect, that, by the interest and influence of parties, it was like there could be no clear procedure before the Sheriff, they did ordain both parties to lead new witnesses before themselves, that they might give a final sentence upon the whole probation. In this case, it was moved by the Lords, if in the Session, or any other judicatory, where there are many Judges, and their determination of the major part be *non liquets*, if the votes of the minor part being positive should be a final decision and sentence, as being a fundamental that the major part agreeing must carry the cause? It was *answered* by others, That, in subordinate judicatories, that is a just ground of advocation; but in the Session, or other Supreme Judicatories, that can be no rule, seeing there can be no appeal or advocation from them; and if the plurality were *non liquet*, there could never be a sentence; because, *non liquet, et nullum judicium, in jure idem sunt;* and so the subjects and kingdom should be at a great loss, if, by reason of intricacy, or ignorance of Judges, parties should be prejudged of the benefit of justice, and pleas should never take an end; and so that, if the obstruction comes from *non liquet* of any of the Lords of Session, they forbear, for a day or two, to put the question to a vote; but, after they have gotten time to advise, they always proceed to a final sentence, by a vote; and albeit the major part be *non liquet*, yet where the most of the rest are affirmative or negative, accordingly the sentence is given, by interlocutors or final sentences; which seems to be well founded in law, equity, and public good; but this question was not here decided in this case, where the remedy was by advocation.

Gosford, MS. No 783. *p.* 490.