

ANSWERED.—That, in a posterior decret of declarator, that was competent and omitted by Colvil.

REPLIED.—It was not competent; because he knew it would be repelled *illo ordine*, till he had first reduced that decret against him for denuding, and their adjudication.

DUPLIED.—Their adjudication was neither libelled on, nor founded upon in the debate; and so could not hinder them from proponing it.

Several of the Lords thought, competent and omitted being a penal exception, introduced to repress dole and fraud in protracting pleas, that it ought to be understood, where the exception was relevant and competent *cum effectu*; therefore, that it did not take place in this case so circumstantiate. Yet the plurality repelled it now; because they found it was competent then, and should have been proponed, and was omitted.

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1693. November 15. The EARL of KINTORE and MR JAMES KEITH *against* HOME of NINEWELLS, AUCHTERLONY, and COUTTS.

MERSINTON reported the cause of the Earl of Kintore and Mr James Keith, against Home of Ninewells, Auchterlony, and Coutts, conform to the new Act of Parliament in summer last, by reading the minutes, signed by both parties' advocates.

The defence was a declinator of the Lords as incompetent; it being a question about a part of the King's revenue, (the retoured and non-entry duties of Falconer of Newton's lands,) which was only proper for the Exchequer, by the Act of Parliament 1633; seeing there was no competition between parties in point of right here, and that the precept bore *capiendo securitatem*.

ANSWERED.—The nature of the debt was here innovated by taking a bond of corroboration; and it was not taken in Sir Thomas Moncreiff the cash-keeper's name, but in the Sheriff-depute's; and it was no more the King's, being gifted to Kintore for his salary as Knight-marshal; and, by this rule, all wards, non-entries, and marriages, and such like casualties of the Crown, might all be claimed to be judged *privativè* by the Exchequer.

The Lords, by plurality, found this case more proper to be judged by the Exchequer, and remitted it thither; but, in regard the charge of horning proceeded upon letters raised before them,—lest they should go on to denounce upon that charge, they declared that diligence null, for securing the suspenders *medio tempore*.

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1693. November 15. ————— *against* SIR ANDREW MURRAY.

IN a declarator of recognition pursued by —————, against Sir Andrew Murray, upon this ground,—That, though his charter bore a blench-holding, yet it had this adjection, “and the other services contained in the old infestments;” and, by the tenor of the prior infestments, it appeared that the lands held clearly ward: and therefore, *primo loco*, the pursuer insisted to have it declared it was a ward-holding.