

and also the Lords declare, That Cullodin and the other feuars shall be liable for all necessary stents of the Town in time coming, being laid on in the method that they prescribed; and doth not repeat the consent as to that declaratory article; which, being *ultra petita*, and extrinsic to the process, cannot be instructed by the decret itself, unless it were warranted by Cullodin's subscription; as was found in the case of the Laird of Buchanan against Lieutenant-colonel Osburn: for there was nothing in the process in time coming, but a charge for a particular stent; and there is a protestation, in the end of the decret, against stents for the expenses of the Town's process, which shows the consent was not, as the decret bears, "for all necessary private stents:" And, as to the decret, in so far as it is a decret *in foro*, it was very just that the Town, being in long possession of imposing private stents upon the feuars, should continue in that possession, until, *in judicio petitorio*, the feuars should liberate themselves by reduction or declarator, as now they have done: And there is nothing more ordinary than to repel, in a suspension, a reason founded upon the point of right, and even to find the letters orderly proceeded, for by-gones, and in all time coming, *in possessorio*; which doth not clash with the contrary decret by reduction or declarator *in petitorio*: as if any party being stopped in their possession of a high-way, should pursue the stopper, if the use of that highway for many years were proven, the Lords would decern the defender to desist from troubling the pursuer in that way in all time coming; and yet the defender might, in a declaratory action, instructing that there were neither constitution nor prescription of that way, be liberated from that servitude. And though, in the debate of this decret of suspension, the Town mention their possession, and Cullodin his infetment, *pro omni alio onere*, yet the Lords' interlocutor doth not express whether they proceed in the point of right or possession; and therefore the sentence must be understood *secundum naturam negotii*, not to be as to the point of right, there being then no declarator depending; but, as to the point of possession, that the Town might continue their possession of stenting, till the point of right were declared. It was replied, That the decret was opposed, bearing to be of consent, which needed not to be repeated to every article; and that the protestation did confirm the consent, as to any other stents but those for expenses of process; and, however, it being a decret *in foro*, decerning for all private stents in time coming, acquiesced in by the space of ten years, it could not be quarrelled of injustice, but behoved to stand as a perpetual rule. The Lords, having considered the whole decret, found, That the consent was not adhibited to the whole articles in the sentence; and therefore did not sustain it as a decret of consent, to exclude this declarator; and found, that, albeit it was *in foro*, being only in a suspension, it did not exclude the suspender's declarator of liberation.

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1674. July 29.

JOHN MITCHEL *against* TULLOS.

ROBERT Schaw, having apprised the lands of Lethingie from his brother Michael Schaw, disposes the same, for security of 5000 merks, to his sister Jean Schaw, Tullos her husband, and their heirs. Thereafter, John Mitchel, stabler,

appriseth the same lands from Robert Schaw : and, in competition betwixt Tullos and him for the maills and duties of the lands, it was alleged by Tullos, That he ought to be preferred ; because Mitchel's apprising is null, as being deduced after the late Act of Parliament anent adjudications, discharging all apprisings thereafter ; and, albeit there be an exception where lands were already apprised, and the legal not expired, yet that can only be understood of apprisings deduced against the same common debtor, or his heirs, being entered or charged : And, albeit there be here an expired apprising of the lands of Lethingie, led by Robert Schaw against Michael Schaw, whereby an apprising, after the said Act, against Michael, or against Robert, as heir to Michael, would be valid,—yet John Mitchel's apprising is only against Robert, *proprio nomine*, for Robert's own debt. It was answered, That the exception in the Act of Parliament is general ; and that the reason of the exception must be, because, where apprisings are led, there cannot be an adjudication of a parcel of the land ; the whole being affected by the apprising, and the right of reversion only remaining, which is not divisible ; and that this, at least, being dubious, John Mitchel was *in bona fide* so to proceed, and should not lose his legal diligence ; which can only give him the reversion, upon payment of 5000 merks, which he is willing to pay, in so far as Jean Schaw, who was fiar of the right, was not satisfied by her intromission with the rents of the lands, either after the right or before the same. It was replied, That Jean's intromission, before the right, cannot satisfy the same, it being only extrinsic, and no liquid compensation ; nor can it be instantly verified, Jean being dead. The Lords sustained Mitchel's apprising, that he might have the benefit to purge Tullos's right, in so far as he was not satisfied, by intromission, by virtue of the right ; but would not sustain prior intromission, not liquidated.

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1674. *November 26.* CAPTAIN WISHART *against* The BISHOP of EDINBURGH.

THE Bishop of Edinburgh, Wishart, having died about Lammas 1671, his son pursues the present bishop for the quots of all testaments that were, or might have been confirmed, before his father's death, or within half a year after, by virtue of the ann. It was alleged for the defender, That the quots, being due for confirmation, could only be due to those that did confirm ; and that they are no part of the yearly rent of the bishop, having a legal term ; but are a part of the casualty due only for, and when confirmations of testaments are granted ; in the same way as the duplications of feu-duties of vassals, or compositions for entering singular successors ; so that the late bishop could have no right but as to what he actually confirmed, and so can have no ann of confirmations made after his death : as, if a commissary-clerk or fiscal had died after the bishop, but within the time of his annat, the bishop's executor could not pretend to the compositions granted by such officers. *2do.* There was no ann due to bishops before the late Act of Parliament *in anno* 1672, at which time Bishop Wishart was dead. It was answered, That the quots are the most considerable part of the bishop's revenue, and might have been set in tack, for a yearly duty, at the ordinary terms ; and that the anns were due by an act of the bishops, upon a