

1630. March 23. JAMES HAY of Tourlands *against* L. AUCHNAMES.

JAMES HAY being infeft in the lands of Corsbie, and others, by disposition of the Earl of Glencairn, (the infeftment being of the superiority disposed to him by the Earl of Glencairn superior thereof), pursues Auchnames by his donatar, to hear and see the lands found in non-entry; and the defender *alleging*, That this pursuer, as superior, nor his donatar, had no right to pursue the non-entry libelled, because, that, before he was infeft in the said superiority by the Earl of Glencairn, the defender was seised in the lands libelled by virtue of a precept directed and granted to that effect by the Earl, to and in his favours; and it being controverted betwixt the parties, if the non-entry for all years intervening after the precept given in favours of Auchnames, by the Earl of Glencairn, and before the taking of sasine, was purged, by granting of the precept, seeing the defender *alleged*, That the sasine ought to be drawn back *ad suam causam*, viz. the precept granted, as said is, whereby he alleged, that the superior had passed from all non-entry after the date thereof; the LORDS found, that the superior's precept purged not the non-entry, for all the years intervening before the taking of sasine by the vassal; for only the sasine, and not the precept, purges non-entry; otherwise the vassal, after the precept, might lie out, to the prejudice of the superior, as long as he pleases; for no entry can be but by sasine; but, because the vassal was seised before the pursuer was seised in the superiority, it was questioned if this right of non-entry might fall under that posterior sasine for the years libelled, which preceded his said sasine, or if the right and action remained with the Earl of Glencairn; and so, if the same pertained to the pursuer by virtue of that posterior sasine; and if that right should extend to all the preceding casualties, or only to those which should fall after the date of the sasine; therefore, the LORDS ordained the pursuer to produce the disposition made to him of that superiority whereon the sasine depended, that thereby it might be known what was comprehended therein. This cause being called July 3. 1632, the pursuer produced the disposition made by the Earl of Glencairn to him, which extended to all bygone casualties preceding that disposition, which were any ways competent to the Earl of Glencairn of before; and so that the Earl was denuded thereby, and that the same pertained to James Hay, and therefore repelled the defender's exception. Likeas, June 10. 1631, in a declarator of non-entry, Kilbirnie *contra* Ker, *voce* SUPERIOR and VASSAL, it was found, that the charter granted by the superior, albeit for sums of money, and obliging the superior to warrandice, yet would not stay the non-entry pursued by the donatar, seeing there was never sasine taken thereon in the lifetime of the superior, granter of the charter; and it was not respected what the defender alleged, that the accident of the superior's death, which hindered the sasine, ought not to prejudice the vassal, seeing the heir, giver of the non-entry, and to whose use it is pursued

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Granting a precept of *clare constat* purges not the non-entry, so long as the vassal is not infeft.

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by the donatar, is obliged to warrant the charter, and will be forced to give him a new charter, whereupon he may be seised. This was repelled; for the party may charge him to enter him, and, if he lie un-entered by the superior's default, it will have its own consideration against the non-entry, but not the default of the vassal, if he charge not the superior to receive him.

Act. *Advocatus & Lawtie.*Alt. *Stuart & Burnet.*Clerk, *Gibson*.*Fol. Dic. v. 2. p. 4. Durie, p. 511.*

* * * Auchinleck reports this case :

1633. *July 3.*—JAMES HAY of Tourlands having a disposition granted to him by the Laird of Glencairn, of the superiority, and whole casualties pertaining thereto, of Corsbie and Muirbroke, and, &c. pertaining in property to Crawford of Auchnames, pursues him for the non-entry of the said lands. It was *alleged* for Auchnames, That there can be no non-entry declared from the year 1584, till the year —, by the space of 38 years or thereby, because the defender's goodsire received a precept of *clare constat* from the said superior pursuer, conform to which he took sasine in *anno 1600*, which sasine must be drawn back to the date of the precept, seeing the superior was denuded of his right to the non-entry by granting of the said precept. To which it was *replied*, That the granting of the precept purges not the non-entry, so long as the vassal is not seised; which reply the LORDS found relevant, and repelled the exception in respect thereof.

Auchinleck, MS. p. 138.

No 12.

1671. *February 10.* The Laird of KELHEAD *against* CARLYLE.

A superior disposed to a donatar all non-entries. The gift was intimated. The vassal's requisition of the superior to enter him without offering the by-gones to him or the donatar, freed him from all subsequent full duties.

IN the action of declarator (See No 24. p. 9306.) at Kelhead's instance against Carlyle of Brydekirk, it being *alleged* for the defender, That he having required Queensberry, his superior, to enter him after requisition, he could only be liable for the retour duties; it was *replied*, That the requisition ought to have been made by presenting a charter and precept, and offering to satisfy all that was due to the superior; at least the bygone non-entries should have been offered to the pursuer, who was donatar, and had intimated his right; and thereupon should have required him to obtain a charter and precept subscribed by the superior his-author.—THE LORDS did sustain the defence to free the defender from the full duties, after the requisition; and found, that the pursuer only having a personal right by assignation to the non-entries, the vassal was only obliged to require his lawful superior, and that the not offering all by-gones to him, who had assigned the same to the pursuer, could not prejudge the defender, who was liable to the donatar for by-gones, and therefore the