

from which they were to sit and remove, set in feu to them by James Hamilton of Livingston, for yearly payment of ; and because it was provided by act of Parliament, that it shall be leisome to all men, as well of kirk-lands as of temporal, to set the same in feu-farm, notwithstanding that the Lord's immediate vassal held the same by ward and relief, there could no farther be decerned of the said lands to fall in non-entries but the retoured mails, or the feu-duties. To this was *answered*, That the immediate superior being decerned to come in non-entries, the lands that he held behoved to come also; and albeit that before the decree there could be no farther sought but the feu or retoured mails, yet, after the decree, all the hail profits of the lands behoved to come in non-entries. THE LORDS, *una voce dissentiente, quod rarum est*, found, That the lands that were holden in feu could not come in non-entries, by reason of the ward, and that there could be no farther sought of them but the feu-duties *quia feodum et hoc genus feodi quod proprie emphyteusis dicitur est perpetuo locatum et quamvis utile dominium transfertur in emphyteuticarium, tamen proprietates remanet penes concedentem*; and so the lands could never be comprised by reason of non-entries, because the property remained still with the setter, and there could be no farther sought but the yearly duty of the infeftment.

Fol. Dic. v. 2. p. 6. Colvil, MS. p. 468.

No 28.

1631. February 3.

OGRIE against MURRAY.

THOMAS OGRIE, as heir to his good-sir, being infeft in *anno* 1630, in the lands of Stobo, pursues David Murray of Hallmyre, superior of the said lands, and who had intromitted with the duties thereof, for payment of the same to him for diverse years before his sasine, and since the decease of his good-sir; and the defender *alleging*, That the lands being in his hands as superior, in non-entry for these years before the pursuer's sasine, he had right thereby to the said duties; and the pursuer *answering*, That the non-entry was not declared; *2do*, That he held the lands blench, so that the superior could have no other duty by non-entry before declarator, but the retour blench-duty; and the ex-cipient *duplicing*, That he being singular successor to the author, of this pursuer's good-sir's right, and, by virtue of his right, in possession of the lands, and neither the pursuer nor his good-sir in possession ever of the land, his possession must be as sufficient to him as a declarator;—THE LORDS found, That this non-entry in blench lands was not sufficient to exclude this pursuit, seeing the superior by the non-entry could claim no more but the retoured blench duties; for this is not alike, as in an annualrent, which the heritor of the land, out of the which it is payable, may bruik ay and while the entry of the annualrenter;

No 29.

In a blench, holding the superior before declarator of non-entry, can claim no more than the retoured blench duties.

No 29.

because the retour and extent of an annualrent is *quod valet seipsum*, and so the superior may bruik it.

Act. *McGill*.Alt. *Nicolson*.

Clerk, _____.

Fol. Dic. v. 2. p. 6. Durie, p. 564.

* * * Spottiswood reports this case :

IN an action pursued by Ogrie against David Murray of Hallmyres, the LORDS found, That Ogrie being served and retoured, and infest as heir to his father in some lands holding of the defender, he had good action to pursue the defender, his superior, for the mails and duties of his lands, intromitted with by him, of all years and terms before the pursuer's retour, since his father's decease, in respect the defender had no declarator of non-entry against the pursuer.

Spottiswood, (NON-ENTRY.) p. 224.

No 30.

1631. July 19.

EARL OF KINGHORN *against* STRANG.

A DECLARATOR of non-entry and comprising thereon was reduced, for this reason, that, before declarator, the feu-duty is only due, whereas the comprising had been deduted for the whole mails and duties.

Fol. Dic. v. 2. p. 6. Durie.

* * * This case is No 5. p. 96. *voce* ADJUDICATION.

1685. March 19.

MARTHA LOCKHART, and HARY DOUGLAS, her Husband, *against* The
EARL of ROXBURGH.

No 31.

MARTHA LOCKHART, and Hary Douglas, her husband, against the Earl of Roxburgh, is reported by Castlehill; and Roxburgh's tutors claiming the by-gone annualrents for the non-entry of sundry years, during which they had lien out without seeking to be infest, since Mr Robert Foulis, their author's death, who was last infest, because in such cases *valet seipsum*;—THE LORDS found, though Roxburgh was superior of this annualrent, yet, seeing the heritable bond from Roxburgh bore an obligation to pay the annualrent, as well not infest as infest, this was equivalent to a discharge of the non-entry; and therefore found no non-entry due.

Fol. Dic. v. 2. p. 6. Fountainhall, v. 1. p. 355.