

Then REPLIED,—That they offered them to prove that that comprising was satisfied by intromission within the years of the legal. This reply was sustained, *ad hunc effectum*, that declarator might be sought for the non-entry of all years since the extinction of the comprising.

Then ALLEGED,—That thir lands holding feu, all that would befall to the superior by reason of the non-entry, was only the retoured mail, viz. the feu-duty before declarator; but *ita est*, the feu-duties for the most part of the years acclaimed are paid and accepted of by the superior. This was found relevant to liberate from declaring the non-entry of such years whereof the feu-duty was paid; but prejudice to crave declarator for the years subsequent: notwithstanding that Sir Robert Sinclair represented, that though, by the common practise, the superior, where his vassal is in non-entry, has nothing but the retoured duty before declarator; yet the same seems altogether unreasonable, seeing by that the superior shall be in no better case, the vassal's lands being in non-entry, nor when the vassal is entered; for in both he has only the feu-duty: and therefore Sir Robert thought the superior should have the retoured duty by and attour the feu-duty, (which he gets though the lands be full,) for all years wherein the lands are in non-entry preceding declarator. This was repelled; because the superior's benefit lies properly here, that as soon as the lands fall in non-entry, he may get the same declared, and then he has right to the hail mails and duties of the land.

Advocates' MS. No. 51, folio 78.

1670. July 1. GEORGE STEWART of Auldham *against* SIR ALEXANDER ACHINMUTY's Relict.

THIS was a pursuit for the mails and duties of some lands whereof he had assignation from the deceased Sir Alexander Achinmuty. Compeared the said Sir Alexander's relict, and ALLEGED,—She was infeft in the same lands, though posterior to his assignation, yet, as a singular successor, behoved to be preferred to him.

The Lords preferred her, because of her infeftment: neither would they sustain his allegiance of ten years possession of the lands, to produce him the benefit of a possessory judgment against her.

Act. Ipse et Lockhart. Alt. Dunmuire and Sinclair.

Advocates' MS. No. 52, folio 78.

1670. July 2. SCOT of Bevelay *against* BINNY, his Mother-in-Law.

THIS was a pursuit at the pursuer's instance, as heir to his father, against his father's relict, as executrix to him, for implement to him of an obligation contained in his father's contract of marriage with his mother, his first

wife, obliging him to employ the sum of _____ to the heirs of the marriage; which he craves to be fulfilled to him as heir of provision of the said marriage.

ALLEGED,—The obligation which is the ground of the pursuit is heritable, viz. to employ upon land or annualrent, and therefore is not prestable by the executor, but only by the heir, which the pursuer's self is; and so the obligation is confounded, he being both debtor and creditor to himself; and alleged the practise *Wilson*, where this was found.

ANSWERED,—That the same being only a destination, it noways made the obligation heritable.

My Lord Stair was content to give them the Lords' answer on the same. *Vide Dury, 12 March, 1622, Fairley.*

Act. Lockhart. Alt. Cunyghame.

Advocates' MS. No. 53, folio 78.

1670. *July 2.* DUMBAR *against* Mr. MURDOCH M'KEINZIE, Bishop of Murray.

THIS was a declarator at this Dumbar's instance against the Bishop and his son, Commissary of Murray, to hear and see it found and declared, that he has the sole and undoubted right of the Commissary clerkship of Murray in all time coming; and for bygones, craves repetition of the whole benefits and obventions of the said office, ever since his unjust and illegal deprivation by the Bishop. It being demanded by the Bishop, by what right or title he laid claim to that office, it was ANSWERED,—He had right from Mr. John Hay, who was established Commissary of Murray, by the King himself his gift under the great seal, in 1646, and ratified thereafter in Parliament; who by his said gift had power to elect and choose such clerks as he pleased himself; which clerks so chosen by him, were to bruik *ad vitam*: and, conform to this power, he nominated this pursuer clerk, who ever continued in the peaceable possession thereof till the act of restitution of Bishops in 1662; at which time the defender, most unorderly thrust him out, and placed in his own son, who has ay possessed sinesyne.

Then the Bishop ALLEGED,—That his right was null, and so could not be declared, because he was placed *a non habente potestatem* to place him: in so far as, *esto argumenti causa*, the gift granted to Commissary Hay had borne an express power to place a clerk, the same was only *stilus curiæ*, and could operate nothing in prejudice of the King, (who at that time, notwithstanding of the gift, might have disposed on the said clerkship to whom he pleased,) nor of the Bishops, who, by the act of restitution, were stated in his place: and they called to mind a practise in 1647, betwixt the Bishop of Galloway and ———, where the Bishop having empowered his Commissary to choose and admit procurators, it was found, by this power, he could not enter a procurator fiscal. But *2do*, The dispositive clause, in all writs, (whether they be charters, gifts, or other writs,) being that which regulates the whole tenor and