

patible right, did absorb and extinguish the rental; and which feu, being delivered up to the marquis, and past from,—all right in that feuar's person is thereby extinct. It was answered, That, albeit a rental and a feu cannot both have effect at the same time, yet they may consist as cumulative securities,—the one, failing the other, to subsist; so that the possessor may defend himself with either; and, if either should be reduced, the other would remain as the effectual right: and, therefore, the giving up, or renouncing the feu, to the marquis, doth only evacuate the same, but doth not take away the rental, which was anterior thereto; and no renunciation can be further extended than to what is expressed, unless it were for an equivalent onerous cause, with absolute warrandice. It was replied for the pursuer, That the giving up of the evidents of the feu by the father, who acquired both rights for his son, an infant, and for onerous causes, doth import absolute warrandice; and must be presumed to renounce all rights, unless the rental had been expressly reserved. The Lords ordained the pursuer to condescend how and when the evidents of feu were delivered up; and to examine the comuners and witnesses thereanent, that it might appear *quid ageretur*; whether to quit all right, or only the feu-right.

*Vol. II, Page 325.*

1675. February 23.

NASMITH *against* SMITH.

NASMITH pursues Smith, as behaving as heir to his brother by intromission with the rents of the lands wherein his brother died infest, for payment of a debt of his brother. The defender alleged Absolvitor, because his brother was never lawfully infest; in so far as he was infest by the usurpers, in place of the Duchess of Hamiltoun, being then forefault; whereas the true superior was Colonel Inglisbie, by a gift from the usurpers; and all these being void after the king's return, the defender infest himself as heir to his father, and so did not represent his brother. The pursuer answered, That the defender, having entered in possession after his brother's death, did enter in his brother's possession; which he could not introvert, though there had been defects in his brother's infestment; who, having been publicly infest, and in possession, and, upon the confidence thereof, having contracted debts with several creditors, the defender could not summarily pass by his brother's right and enter as heir to his father; but ought first to have raised reduction or declarator of the nullity of his brother's infestment, and called his creditors thereto; for, if such courses be sustained, it lays a patent way to deceive all creditors contracting *bona fide* with the fiar for the time, by entering to a former predecessor, and abstracting and quarrelling the last fiar's right. The defender replied, That behaving as heir is always with presumption of *animus immiscendi*; which cannot be in this case, for the defender shows he had no mind to meddle with his brother's heritage; and that he would not enter heir to him, but to his father. The Lords ordained the defence, as to Inglisbie's right of superiority, to be first proven; reserving to themselves,—if it should be proven how far the defender should be liable, in regard of his brother's infestment,—whether for the duties intromitted with by him, before his brother's right were found null, yea or not.

*Vol. II, Page 326.*