

No 34. addebted by his own immediate vassals, who could not make any subaltern right, which could prejudice the King, or his pensioner, to point or comprise the lands for the said feu-duty, and which he might seek from his own vassal, without necessity to take notice of any right flowing from him to his sub-vassals.

Act. Nicolson & Mowat.

Alt. *Advocatus*, Stuart, & Gibson.

Clerk, Hay.

*Durie*, p. 746. & 833.

1675. February 17. STUART against LORD FORRESTER.

No 35.

A gift of non-entry granted before the casualty fell, and a general declarator thereon, were found a good title, after the casualty fell; but full mails and duties were found due only from the time of the superior's concurrence.

THE deceased Earl of Murray gave a gift of non-entry of certain lands held by him of the Earl to George Stuart, who many years since raised a general declarator, and now insists thereon. The defender *alleged* absolutor, because the gift of non-entry was granted when it was not vacant, the lands being then full. The pursuer *answered*, That albeit the not vacancy be a sufficient reason to annul gifts obtained from the King, as surreptitious, or obreptitious and hurtful to the Crown, by granting of gifts by anticipation, before the casualties be vacant; yet this holds not in the case of subjects, *quia debent sibi invigilare*; so that the casualty occurring thereafter accresces to the donatar. *2do*, This is *jus tertii* to the defender, and this present Earl of Murray concurs. It was *replied*, That whatever might be pretended, if the casualty had become vacant during the life of the granter of the gift, it can never be extended to those occurring after his death; and as to the concurrence, *non relevat*, unless this Earl give a new gift; and the defender had good interest to propone this defence, because if the gift and declarator should stand, he would be liable for the full mails and duties from the date of the citation, by the space of 15 or 16 years.

THE LORDS found that the gift or declarator could have no effect until the concurrence of this Earl of Murray, and therefore sustained the same only from the time of the concurrence, but not to infer mails and duties from the citation.

*Fol. Dic. v. 2. p. 6. Stair, v. 2. p. 323.*

1675. June 23. DOUGLAS of Kelhead against CARLYLE and Others.

No 36.

A superior having assigned his right to the non-entry of lands, the full duty was given, not from citation, but from the date of production of the assignees title.

KELHEAD pursued a declarator of non-entry, pretending that he was superior of the lands libelled; in which process, it was *alleged*, That he was not superior of the said lands, in respect the right libelled, that he had from my Lord Queensberry, was to be holden of the disponer; and Queensberry being superior to the defenders, could not interpose another betwixt him and them; and upon the proponing of the said allegiance, the pursuer was forced to reply upon a right to the casualties granted by a paper apart by my Lord Queensberry to the pursuer; and thereupon process was sustained, and decret given for the retoured duty before the intending of the declarator, and the full avail