

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

and rent of the land after the intending of the cause; of which, suspension being raised upon these reasons; *imo*, That, after decret of declarator was recovered, the superior and his donatar have right to the lands during the non-entry, and may remove tenants, or uplift the duties from them; but before declarator, there could not be a sentence for pointing the ground, for the full avail; *2do*, Though the ground could be pointed for the full avail, yet the pursuer has no right but to the feu-duties, even after the intending of the cause, before the pursuer did found upon and produce the assignation foresaid, as his right to the casualties; seeing there being a question whether my Lord Queensberry or the pursuer had right to the superiority, and the libel being only founded upon the pursuers right as superior, the defender was *in bona fide*, and could not enter nor be liable for the full avail, until the question was cleared by production of the said assignation, and therefore could not be liable until the same was produced.

THE LORDS as to the *first* reason, found, That after the intending of the declarator of non-entry, at the instance of the party having right, the defenders are liable in the full avail, and that the real conclusion of pointing the ground for the same may be sustained, seeing the ground may be pointed for a rent liquidate, as it was in this case; and when lands are not retoured, the pursuer, even before declarator, may crave right to the rents. As to the *second*, the LORDS were all clear, that the defender was not liable for the full avail, but after production of the title, whereupon the pursuit is sustained; but it being moved, that the defender having proponed the said allegiance before the same was repelled, and decret given out for the full avail, after intention of the cause; some of the LORDS were of the opinion, that there was no remedy; others thought, that there being a clear iniquity and prejudice to the party, and the LORDS being convinced of the same, they ought to do justice to the party; and the question being brought before them upon suspension *ex incontinenti*, and not *ex intervallo*, the sentence *non transivit in rem judicatam*; whereupon some heat having arisen among the LORDS, while some did plead the credit of the house, and the security of the people, that the decreets of the LORDS *in foro* should be an ultimate and unquestionable decision; and others thought and did represent, that the honour of the house, and interest and security of the people consists in this, that justice should be done, and no evident iniquity should be without remedy, especially where a decret has not taken effect, and become *res judicata*, but is drawn in question immediately by a suspension; the LORDS did demur, and decided not that point. See PERSONAL & REAL.

*Fol. Dic. v. 2. p. 6. Dirleton, No 273. p. 132.*

No 36.

\* \* \* Stair reports the same case :

1675. *July 16.*—THE Laird of Kelhead having obtained a right from the Earl of Queensberry, the Earl of Queensberry interposing Kelhead betwixt himself and his vassals, did thereupon pursue general and special declarator of non-entry, and obtained decret. The vassals suspend on these reasons; *imo*, The decret is null, in so far as after the pronouncing thereof, the same with the summons whereupon it proceeded were cut, and a new conclusion libelled for pointing the ground for the full rents, by the general declarator, which the LORDS would never have sustained, being against law; for the retoured duties by the general declarator are *debita fundi*, until the vassals be cited in the special declarator, which is but a personal action the superiors have for the mails and duties of ward-lands.

Which the LORDS having found upon inquiry of the clerks and servants, did reponne the defenders against the decret, and found the vassals only liable for the rents, in so far as they had intromitted personally.

The suspenders further *alleged*, that seeing they are now reponed, they allege that the full duties cannot be due from the citation in the declarator, as ordinarily it is sustained upon this ground, that after the citation the vassals are *in mala fide*, and contumacious, in not craving the renovation of their infeftments, or relinquishing their possession; which cannot hold in this case, for Kelhead's infeftment being null, because thereby he was interposed betwixt the superior and his vassals, they were *in bona fide* to continue their possession, and not to seek renovation of their infeftments from Kelhead, whom they were not obliged to acknowledge as their superior. It was *answered*, that this allegiance was proponed and repelled in the decret, in respect of this reply, that in Kelhead's disposition, not only is the superiority disponed, but *per expressum* all the casualties of Queensberry's superiority, whereby though his infeftment of the superiority itself was not valid, yet by the disposition of the casualties, he had right as donatar, and therefore the full duties were found due from the citation on the general declarator. It was *replied*, that the vassals were not contumacious by the citation, which was only founded upon the infeftment, which did not express an assignation to the casualties, but only bore a general clause according to the provisions contained in the disposition; so that they were never *in mala fide*, till the disposition was replied upon, and produced, which cannot be excluded as competent and omitted, because the suspenders are reponed against the decret.

THE LORDS found the vassals liable for the full duty, only from the date of the reply, and production of Queensberry's disposition, containing an assignation to the casualties and superiority, in respect the vassals were not contumacious before.