No 40.

by the Lords,) was very doubtful whether valid or not, it being apparently prescrived, since no infeftment was taken, and is 66 years after its date; *3tio*, The act 1693 seems only to relate to precepts granted by subjects; but the King cannot die.

Answered for the pursuer; That it is a known principle, that the full duties are due from the citation in the declarator; nor is this odious, since it is inherent in the nature of all fees; and this the LORDS found, Harper against his Vassals, No 23. p. 9305.; and Faa against the Lord Balmerino and Powrie, No 25. p. 9307.; nay, this the LORDS found in the case of the Earl of Argyle against M'Leod, though there the non-entry arose from the reduction of a retour, and so the defender had much stronger pretensions to a *bona fides* till the sentence in the reduction, than here the defenders can pretend to; *2do*, Since here the common debtor's representative makes no objections against the pursuer's title (neither can he without disclamation,) so the creditors can make none, except in the right of the said apparent heir; and consequently it was in vain for them, whom the superior is not bound to notice, to pretend to any other ground of *bona fides* except such as would have been competent to the apparent heir himself. In short, the casualty does not arise from theirs, but the heir's non-entry; and therefore no *bona fides* can defend against it, but his alone by whom it falls; and therefore, *3tio* Since Newton could not mistake his superior, or be *in bona fide* to quarrel his right, neither can the creditors; besides, that the creditors being real by infeftment, How could they be so without knowing the condition of their author's right, (who infeft them,) and consequently who was his superior? since unusquisque scire debet conditionem ejus cum quo contrahit. And as to precedents and the Lords' practice, the pretence to *bona fides* and dubiety was sustained only in case of a singular successor to the superiority, but never where there was no change of the superior; *4tio*, It is scarce possible to find out habile circumstances for finding such a pretext.

"THE LORDS found the creditors liable for the full rents from the time that their objections against the pursuer's title were repelled."

Act. *Ro. Dundas.* Alt. *Ila.* Clerk, *M'Kenzie.*

Fol. Dic. v. 2. p. 7. Bruce, v. 2. No 36. p. 46.

*** A similar decision was pronounced 24th June 1715, Governors of Heriot's Hospital against Hepburn, No 54. p. 7986., *voce* KIRK PATRIMONY.

No 41.
A person having made up singular titles to his prede-

1745. *June* 29. CAPTAIN CHALMER *against* HIS VASSALS.

CAPTAIN CHALMER of Gadgirth pursued his vassals for non-entry duties, who *answered*, They could only be liable from the time he was infeft himself, because the affairs of the family of Gadgirth had been in such confusion, and the

rights to the estate so perplexed with diligence and transactions, that it was impossible to know who was superior; and so the vassals were not *in mora* of taking infeftment.

No 41. cessor's estate, the vassals were found not liable in non-entry duties preceding the date of his charter, the superior having been uncertain, in respect the estate was affected by many transactions and diligences.

THE LORD ORDINARY, 9th June 1744, " found that, in this special case, the defenders were not liable for either retoured or non-entry duties, preceding the date of the pursuer's charter."

Pleaded in a reclaiming bill, The retoured duties payable on non-entry, ought not to be considered as penal; but as the vassal without infeftment has no right to the estate, the profits of course belong to the superior, which our law has mildly restricted to the retoured duties as the presumed value of the land; and therefore to make them due, it is not necessary to consider the vassal as in any fault, or *mora*. Stair, B. 2. T. 4. § 23, admits of many exceptions to excuse from the full rents, but reckons the claim for the retoured duties as favourable, where he also says, ' That it is not the negligence of the vassal, but ' the nature of the right that infers non-entry.' And Craig, L. 2. Dieg. 19, speaking of the entire forfeiture of the subject, which was the sanction of the feudal law, and saying that *mitiores pœnæ nobis placuerunt*, means the claim, when extended to the whole rents, which alone he considers as a penalty.

These duties are due to the superior's heir, though not entered himself, unless the vassal obtain infeftments, by taking the course the law prescribes.

It is affected, to pretend the superior could not be known. It was easy to find out the heir of the family, who could invest them, notwithstanding there might be adjudications against him, or if there were infeftments on any adjudications, the heir could do it, during the legal, and when that was expired, the adjudger.

Answered, If this question were to be determined by the feudal law in its utmost severity, the claim must be excluded, since *bona fides* is the foundation of the bond between superior and vassal, and a just cause of delay will excuse; and this is mentioned as one, Si domini heres incertus sit, et si controversia sit de hereditate, L. 2. Feud. T. 2. Craig, L. 2. D. 12. § 3. et 7. Cujacius in lib. 5. juris feudalis; Struvius in jus feudale, C. 1. § 8.; and Craig's expression of *mitior pœna*, means as well the small duties, which are a penalty, though milder, as the whole mails.

The pursuer himself holds his lands blench of the Prince, to whom therefore his non-entry belonged; and he having obtained a charter without any composition, cannot extend it against the respondents.

He has not made up his title as heir to his predecessors, but possesses as a singular successor; and as the superior was absolutely unknown, it was impossible to run precepts; besides, the competency of this method of getting infeftment can be of no influence in a question concerning the non-entry duties, as it was introduced by act 57th Parl. 7th Ja. III. before which this question might have occurred; and then it must either have been admitted as a defence, that

No 41.

the vassal was not *in mora*, or vassals would have been in a miserable case, who could not get infeftment when they applied for it.

THE LORDS, 20th June 1745, "found, that whereas the petitioner did not claim the superiority as heir to his predecessor, but as a singular successor; therefore adhered to the Lord Ordinary's interlocutor."

Pleaded further in another bill; That casualties of superiority, before they are divided from it by declarator, go along therewith; and therefore the Captain having, whether as heir or singular successor, acquired right to the superiority, has right to the casualties thereof incurred and never separated; Dirleton, word, CASUALTIES of SUPERIORITY, Stewart's Answers, and a decision 11th July 1673, Robert Faa against Lord Balmerino and Powrie, No 20. p. 5449, *voce* HERITABLE and MOVEABLE. See No 25. p. 9307.

Observed on the Bench, That the former interlocutor adhering to the Lord Ordinary's, went on the specialties of the case in the uncertainty of the superior, not solely on the pursuer's being a singular successor.

"THE LORDS adhered."

Act. *A. Macdoual, W. Grant et Lockhart.* Alt. *Alex. Boswell.* Clerk, *Forbes.*

Fol. Dic. v. 4. *p.* 19. *D. Falconer, v.* 1. *p.* 111.

SECT. V.

Conjunct fee excludes non-entry.—Non-entry excluded where the lands have been full thirty six-years.

1511. *December* 11. The KING *against* The LAIRD of GRANTULLIE.

No 42.

GIF ony over-lord call and persew his tenent to heir and se his landis pertening to him decernit to have bene in non-entres be the space of divers and sindrie zeiris, viz. be the space of fiftie or sixtie zeiris, or fra thyne furth, and the partie defendar produce ony saisine or saisines, beirand him and his predecessouris, or himself allanerlie, to have bene lauchfullie saisit in the saidis landis be the space of fiftie zeiris immediatlie preceding the day and dait of the summoundis intentit againis him, he aucht and sould be simpliciter assoilzeit fra the clame and petitioun proponit and persewit againis him tuiching the non-entres of the saidis landis, not onlie of the said space of fiftie zeiris, during the quhilk thay wer full, bot also of all uther zeiris and termis precedand the samin.

Balfour, (NON-ENTRY OF HEIRS.) *No* 23. *p.* 262.