1696. *February* 25.

EARL OF CASSILIS *against* SIR THOMAS KENEDY, AND ROBERT BLACKWOOD.

No 26.
Found, that though an apparent heirs minority expired, the ward ceased, yet the superior and his donatary being in possession by virtue of the ward, he had full right to the mails and duties till an offer was made of a charter and a year's rent.

THE LORDS advised the declarator pursued by the Earl of Cassilis, as superior of Dalmorton, a part of Kennedy of Girvanmain's, estate, holding ward of him, against Sir Thomas Kennedy, and Baillie Robert Blackwood, purchaser of that estate at a roup. The LORDS found, though the apparent heir's minority being expired, the ward ceased, yet the superior and his donatar being in possession by virtue of the ward, he had right to the full mails and duties of the lands till an offer was made, not only of a charter, but also of a year's rent, if a singular successor craved to enter; and that non-entry subsequent to the ward was of the nature of the ward; and though it was urged, that, by the current of decisions, he had only right to three terms, conform to Durie, 23d January 1630, Peibles, *voce* SUPERIOR & VASSAL; and Lesly, No 9. p. 9289. and Hope in his lesser Tractat, and Stair *lib.* 2. *tit.* 4. yet the plurality found he had right to the full rent, even beyond three terms, ay till he was interpelled, which is too great an extension of this causuality. The next question was, if the superior could both exact a *relief* here, and also a composition from the creditors-adjudgers; and what the relief in such cases was? The LORDS found the relief was not a full year's rent, as Cassillis contended, but only the favourable rent, which was only the retoured duty, and that here he could not demand both; and there was only due a year's rent for receiving the adjudgers, and for changing his vassal, introduced by our statue 1469. See 9th February 1669, David French against the Duke of Hamilton and his donatar, for receiving him to the lands of Millburn, where it is determined what offers could legally stop the ward and non-entry, No 30. p. 6911., See RELIEF CASUALTY OF.

Fol. Dic. v. 2. *p.* 5. *Fountainhall, v.* 1. *p.* 714.

SECT. III.

What are the Non-entry Duties before Declarator?

1554. *December* 19. DOUGLAS *against* FEUARS of COLBURN.

No 27.
Where lands hold feu, no more is due.

ANENT the action moved by Mr Archibald Douglas, as donatar to the non-entries of Colburn, against the tenants feuars thereof, for the profits of the said

No 27.
for non-entry but the feu-mail.

lands during the time of the non-entries, it was *excepted*, That the feu-lands came not in non-entries; and giving that they came in non-entries, no farther profit should pertain to the superior but the feu-mails. It was *decerned*, That feu-lands were in non-entries, so long as no sasine was taken of the same, and no farther profit to pertain to the superior than the feu-mails, which the superior might poind for by reason of non-entries; but in case the lands be full, he may not poind, but call and pursue.

Fol. Dic. v. 2. p. 6. Maitland, MS. p. 221.

1591. *June.* MASTER of LINDSAY *against* HAMILTONS.

No 28.
Found as above.

THE Master of Lindsay and David Dundas of Priestinch, as having the gift of non-entries of the lands of Bruis and Crossflat, and certain other lands within the barony of Abercrombie, warned James Hamilton of Livingston, and Patrick Hamilton, his son, and Mathew Hamilton of P., to flit and remove from the said lands. It was *excepted* by the said James and Patrick Hamiltons, That they ought not to remove, because the title used by the pursuer was a decree of non-entries, which was taken away, in so far as there was a decree-arbitral upon a submission, whereby the Master and David Dundas had renounced all right and title that they had by virtue of the said decree. It was *replied*, That they could not be heard to propone the renunciation made by virtue of the said decree; because of before there was a process of comprising deduced, whereby, by virtue of the said decree, the whole lands which the defenders were warned to remove from were decerned to be comprised for the by-run duties; and the said defenders compeared in the said process, and made defence, and proponed not this defence of the renunciation of the decree, which would have been very competent to them to have elided and stopped the comprising; and having *dolose* omitted the same, could not be heard as to another judgment to propone the same. It was *answered*, That the defence, proponed now of the renunciation of the decree-arbitral, was most competent in this time, after the intenting of the warning, and to take away the decree arbitral, whereby the warning was made, which was not by reason of the comprising, but by virtue of the decree of non-entries. It was *answered*, That this allegeance would ay have slain the comprising, and the decree whereupon the comprising followed, and so behoved to be ay *dolose* omitted, and could not now be proponed *quia leges nunquam patrocinantur dolo et fraudi.* THE LORDS repelled the exception, in respect of the reply, and found that because this allegeance was not proponed the time of the comprising, it behoved necessarily to be *dolose* omitted. *Advocatus et pauci alii fuerunt in contraria opinione.*

Into the same action and cause it was *excepted* for Mathew Hamilton and his wife, That they could not be decerned to flit and remove; because, long before the warning, they had the five oxengate of land of the lands of Philipstone,