

1612. June 20.

A. against B.

No 8.

THERE are non-entries of lands holden burgage, neither will the relict obtain any terce thereof.

Fol. Dic. v. 2. p. 4. Haddington, v. 2. No 2461.

1622. March 23.

LO. LESLIE against L. of PITCAPLE.

No 9.

LO. LESLIE having pursued the L. of Pitcaple, who held certain lands of him by service of ward and relief, for payment of the mails and duties of the lands of all years during the ward; and sicklike of all years during the non-entry of the apparent heir, after the expiring of the ward;—the LORDS found, That the superior nor his donatar could not have action for the mails and duties of the lands of any years during which the same was in non-entry, before he obtained decret and declarator finding the lands to be in non-entry; preceding the which declarator, the superior could not have right to mails and duties of the lands of any year preceding the declarator, but for the preceding years he had only right to the retoured duty, and no further, except always the three terms immediately subsequent to the ward; for the which three terms allenarly, and no more, the non-entry was found to be of the nature of the ward, and that the superior might seek the mails of the lands for the three terms, without a declarator of non-entry, sicklike as he might do during the time of the ward, without any declarator, but after the expiring of the three terms of non-entry ceased to be of the nature of the ward, so that he could get no more but the retoured duty before declarator.

The retour of a whole barony, of which the lands libelled were a part, found to serve for the lands fallen in non-entry, so as to exclude further demand for them before declarator, except their proportion of the whole.

This same cause being thereafter called again in presence of the LORDS, and the parties heard to dispute at great length therein, the LORDS *de novo* found, as is here noted, that before declarator, the superior not being in possession, nor his donatar of the lands, by virtue of the ward, he could seek no more for the non-entry, albeit subsequent to a ward, except the retoured mails. Also they found, that the retour of the whole barony, whereof the lands libelled were a part, served for the lands fallen in non-entry, to exclude any further to be sought for these lands before declarator, except the proportion of the mail to which the whole barony was retoured, albeit these lands were not specially retoured *per se*.

Act. Hope & Aiton.

Alt. Peebles & Baird.

Clerk, Hay.

Fol. Dic. v. 2. p. 6. Durie, p. 24.