

1670. *July 1.* ANENT COMPETENT and OMITTED.

ONE being charged on a decret, suspended upon a reason: To which it was ANSWERED, That the same could not now be received, because it was competent against the decret and omitted. To which it was REPLIED, That the defence of *competent and omitted* could not be objected where the decret was obtained before an inferior Court, as this was.

My Lord Stair found, if it had been in *re ardua et difficili*, which the ordinary procurators before these Courts could not well understand, that their omitting of a defence then would not have secluded the party from proponing of it now: but being in *re facili et levis momenti*, he found it relevant.

*Act.* Mr. Thomas Murray. *Alt.* Leirmonth.

*Advocates' MS. No. 49, folio 78.*

1670. *July 1.* A poor Englishwoman, FRANCISCA HEATH, *against* my LORD LUNDORS.

THIS was a pursuit for her entertaining him by the space of fourteen or fifteen weeks at London, conform to his subscribed account.

ALLEGED,—The account is null, because it wants writer's name and witnesses.

ANSWERED,—Refers the verity of the subscription to his oath.

REPLIED,—She cannot be heard, except she likewise refer, that the sum is yet resting owing, to his oath. The Lords repelled the reply.

2do, ALLEGED,—That he being incarcerated in the King's Bench at London, for this same very debt, he was set at liberty; in which cases, it is offered to be proven that the keeper of the Bench becomes solely and privative debtor for the same; so that the debtor can no more be pursued. This allegiance was found relevant; they proving the custom. Which, if it were cumulative, would seem just; but as it is conceived, seems very unreasonable.

*Act.* Mr. William Baillie. *Alt.* Cheap.

*Advocates' MS. No. 50. folio 78.*

1670. *July 1.* The MASTER of GRAY *against* RAMSAY.

THIS is a declarator of non-entry at the superior's instance against his vassal. Against which it was ALLEGED, That the lands were full, the years acclaimed; in so far as the defender had comprised the same, and was infest therein, at least had charged the superior. Which allegiance the Lords sustained for stopping all declarator of non-entry for all years from the date of the infestment, or of the lawful charge.

Then REPLIED,—That they offered them to prove that that comprising was satisfied by intromission within the years of the legal. This reply was sustained, *ad hunc effectum*, that declarator might be sought for the non-entry of all years since the extinction of the comprising.

Then ALLEGED,—That thir lands holding feu, all that would befall to the superior by reason of the non-entry, was only the retoured mail, viz. the feu-duty before declarator; but *ita est*, the feu-duties for the most part of the years acclaimed are paid and accepted of by the superior. This was found relevant to liberate from declaring the non-entry of such years whereof the feu-duty was paid; but prejudice to crave declarator for the years subsequent: notwithstanding that Sir Robert Sinclair represented, that though, by the common practise, the superior, where his vassal is in non-entry, has nothing but the retoured duty before declarator; yet the same seems altogether unreasonable, seeing by that the superior shall be in no better case, the vassal's lands being in non-entry, nor when the vassal is entered; for in both he has only the feu-duty: and therefore Sir Robert thought the superior should have the retoured duty by and attour the feu-duty, (which he gets though the lands be full,) for all years wherein the lands are in non-entry preceding declarator. This was repelled; because the superior's benefit lies properly here, that as soon as the lands fall in non-entry, he may get the same declared, and then he has right to the hail mails and duties of the land.

*Advocates' MS. No. 51, folio 78.*

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1670. July 1. GEORGE STEWART of Auldham *against* SIR ALEXANDER ACHINMUTY's Relict.

THIS was a pursuit for the mails and duties of some lands whereof he had assignation from the deceased Sir Alexander Achinmuty. Compeared the said Sir Alexander's relict, and ALLEGED,—She was infeft in the same lands, though posterior to his assignation, yet, as a singular successor, behoved to be preferred to him.

The Lords preferred her, because of her infeftment: neither would they sustain his allegiance of ten years possession of the lands, to produce him the benefit of a possessory judgment against her.

*Act. Ipse et Lockhart. Alt. Dunmuire and Sinclair.*

*Advocates' MS. No. 52, folio 78.*

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1670. July 2. SCOT of Bevelay *against* BINNY, his Mother-in-Law.

THIS was a pursuit at the pursuer's instance, as heir to his father, against his father's relict, as executrix to him, for implement to him of an obligation contained in his father's contract of marriage with his mother, his first