

sentence and after probation in the special declarator. The Lords, after reasoning among themselves, inclined to give decret for the mails and duties from the date of litiscontestation in the special declarator; but, because the pursuer alleged there was a practick *in terminis*, finding them due from the date of the citation, they ordained the practick to be produced.

No. 10.

Fol. Dic. v. 2. p. 406. Gosford MS. p. 121. & 126.

* * See No. 24. p. 9306. *voce* NON-ENTRY.

1672. November 26. EARL of ARGYLE against LAIRD of M'LEOD.

The Earl of Argyle pursues a declarator of non-entry of certain lands, holden by the Laird of M'Leod of the late Marquis of Argyle. The defender alleged, Absolvitor, because the lands are full, in so far as the defender's brother being retoured heir to his father in these lands, the retour expressly bears, that the lands were holden of the King, by reason of the forfeiture of the late Marquis of Argyle, and thereupon he was infeft by the King; likeas the defender was in the same way as heir to his brother, and stands infeft holden of the King. It was replied, That the pursuer repeats his reduction of the defender's retour, and that the same is null, in so far as, before the defender was retoured, the King had granted a gift to this Earl of his father's forfeited estate, so that the Earl returned to be superior to M'Leod, and vassal to the King, in these lands; and albeit the inquest are excusable, that they served the defender conform to his brother's service, yet the defender is not, who, by the public registers, might have known that the Earl of Argyle was returned to be his superior. The defender answered, That it is a fundamental law of this kingdom, that the King, nor any superior, cannot interpose another superior betwixt him and his immediate vassal; and the King having, after the forfeiture, received M'Leod as his immediate vassal, could not thereafter interpose the Earl of Argyle by his gift; which, if it had been done by any other superior, would have been without question; and in this the King *utitur jure communi*. It was replied, That if the King, by any gift, had admitted M'Leod as his immediate vassal, he could not thereafter have interposed another; but there is nothing done here but a retour and infeftment thereupon of course.

No. 11.

Exception in the case of forfeiture.

The Lords repelled the defence, and found the King might interpose a superior in place of the forfeited person, having by no gift nor express deed accepted the vassal of the forfeited person in his place.

The defender farther alleged, That he having so probable a cause of mistake, the reduction of his retour can only take effect from the citation on the reduction, or on the non-entry; for reductions are no further drawn back ordinarily; and this case is most favourable, for the late Marquis of Argyle having taken a gift of

No. 11. M'Leod's escheat single and life-rent, he was necessitated to resign these lands, which he held immediately of the King before, and take them holden of the late Marquis of Argyle.

The Lords reduced the retour; but found the non-entry only to take place from the citation.

Fol. Dic. v. 2. p. 407. Stair, v. 2. p. 122.

. Gosford reports this case:

1672. November 27.—In a declarator of non-entry at the instance of the Earl of Argyle's donatar against M'Leod, as vassal to the Earl, by holding the lands of Glen-eagle of him as superior, as likewise having intented a reduction of M'Leod's infeftment to be holden of the King, it was alleged, That M'Leod's being infeft as heir to his brother, who was infeft during the forfeiture of the late Marquis of Argyle, likewise to be holden of the King, as having the only right of superiority, the lands cannot be declared to be in non-entry, because the King, being only superior and having received M'Leod his vassal, could not thereafter, by a posterior gift of forfeiture, interpose Argyle as a new superior betwixt him and the King, there being *jus acquisitum* to M'Leod, by his infeftment upon the retour; at least he being *in bona fide* to retour himself to be holden of the King, as said is, there can be no declarator for non-entry until he be entered vassal to the Earl, and then that his heirs lie out from entering. It was replied, That these lands being formerly holden of the Earl of Argyle, before the forfeiture, the King was not denuded by the retour of M'Leod, which was not *habilis modus*, but having disposed the superiority to this Earl, who was infeft under the Great Seal, M'Leod, who was vassal to the Earl's predecessors, was *in pessima fide* to retour himself to be holden of the King, and the retour ought to be reduced, and the lands declared to have been in non-entry.

The Lords did find, That albeit M'Leod, by retour, was made the King's immediate vassal, yet it did not hinder the King to grant a gift of the superiority, which fell by the forfeiture, whereof the King was not denuded by receiving a vassal upon his retour, and notwithstanding thereof might dispone the superiority to another; which being done by a charter under the Great Seal, M'Leod returned to be vassal to him as superior, and must enter his vassal; and so reduced his retour, as being null in time coming. Yet they found it was not null *ab initio*, and that he being *in bona fide*, not only before the forfeiture, but in all time thereafter, until the intending of the declarator, he ought to be assoilzied from all by-gone non-entries, and only to be liable after citation upon Argyle's right.

Gosford MS. p. 280.

. A similar decision was pronounced, No. 182. p. 10975. *voce* PRESCRIPTION, Duke of Gordon against M'Intosh.