

superior having no reason to refuse to enter him, nor declaring his unwillingness to subscribe a charter and precept, when it should be presented, the vassal was not thereafter liable *ob contemptum* to the full duties of the lands.

Fol. Dic. v. 2. p. 5. Gosford, MS. No 333. p. 152.

No 12.

1678. July 18.

FULLERTON against DENHOLMS.

JOHN FULLERTON, as donatar to the non-entry of the lands of Straiton, holden of William Stodhart, pursues declarator of non-entry against Catharine and Marion Denholms, who *alleged* absolvitor, because the lands are holden feu, and they offer the feu-duties with a precept of *clare constat*, whereby they shew themselves desirous to enter, and were neither in contempt nor contumacy against their superior. It was *answered, Non relevat*, unless they were retoured heirs, and had precepts out of the chancery. It was *replied*, That they were called in this process as apparent heirs, and so were acknowledged by the pursuer, and it needed not to be instructed by a retour.

THE LORDS repelled the defence, and found the non-entry to run till the superior was required to enter upon the retour, and that a precept of *clare constat* is a favour which the superior is not obliged to grant. See SUPERIOR and VASSAL.

Fol. Dic. v. 2. p. 5. Stair, v. 2. p. 636.

* * * Fountainhall reports this case :

July 17.—IN a declarator of non-entry, *alleged* they had offered a precept of *clare constat* to their superior. *Answered*, He was not bound to subscribe it, because they were not served heirs.—THE LORDS found the lands in non-entry only *quoad* the retoured mail.

Fountainhall, MS.

1684. March. DUKE OF HAMILTON against MR JOHN ELIES of Elieston.

IN a declarator of non-entry, at the instance of the Duke of Hamilton against Mr John Elies of Elieston, for mails and duties since the raising of the process in the year 1672, and the retoured duty in the year 1660;

Alleged for the defender; The lands are full, *imo*, By infeftment upon a charter granted by the usurper; *2do*, By a charge of horning given to the Duke by the defender upon an adjudication.

Answered, imo, The charter from the usurper cannot defend after the King's restoration, when the Duke of Hamilton is restored to the superiority, which was taken away by the English; *2do*, The giving of a charge of horning is

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Precepts of *clare constat* are voluntary, and the superior cannot be *in mora* for refusing them. Non-entry duties therefore run, till the heir be retoured, and get precepts out of Chancery requiring the superior to infeft.

No 14.

A simple charge is not sufficient to put the superior *in mora*. See No 30. p. 6911.

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not relevant, unless a charter and a year's duty had been therewith-offered, without which the superior was not obliged to enter the defender. For the reservation in the act rescissory of all rights and infeftments granted by the usurper, is only to be understood of rights of lands held immediately of the King.

THE LORDS repelled the allegiances, in respect of the answers. Here the Duke did not suspend the charge. And though, when a year's duty is not offered with the charter, it should not hinder the casualties of the ward of marriage to fall to the superior, as was found in Milburn's case, (No 30. p. 6911.) that being the *reddendo* of a ward-holding; yet mails and duties in a non-entry seem to be *causa pænæ* for neglect, which is less favourable.

Fol. Dic. v. 2. p. 5. Harcarse, (NON-ENTRY.) No 732. p. 207.

* * * Fountainhall reports this case :

1684. *March 12.*—DUKE HAMILTON'S action of non-entry against Mr John Elies, for his lands of Elieston, being reported by Drumcain, the LORDS found Elieston's charter and sasine, which he had got from the usurper, when the estate of Hamilton was sequestrated, could not defend him against the non-entry, but only for the years before the King's coming home; because the Dutchess of Hamilton was then restored, not *per modum gratiæ*, but *per viam justitiæ*; and that the Duke and Dutchess held not these lands of the King, but of Campbell of Kilpont, and he of Montrose, who held them of the King.—Yet, by the 12th act of Parliament 1661, all the charters and other writs, granted to private parties of their lands in these times, are ratified; and, at least, they are not null *ope exceptionis*, but should bide a reduction. And as for Elieston's sasine on the Duke's own charter, before answer ordained Robert Hamilton of Presmennan to depone what were the terms whereon that deposited charter was to be given up to Elieston. The words of this interlocutor were: "Find the charter given by the usurper can only defend against the non-entry till the restoration of the Dutchess of Hamilton; but, after that restoration, that the lands are in non-entry, the defender not being then infeft, holding of the pursuers; and therefore repel that defence. And as to the other defence, founded on an infeftment flowing from the Duke, and offering to prove that the sasine produced proceeded upon a charter granted by the Duke, before answer ordain Robert Hamilton to depone if the charter was delivered to him for the behoof of the defender, and on what terms the same was delivered to him, or if he did ever deliver the same to the defender, or back again to the pursuer."—And Robert having deponed, that it was deposited till the Duke should give orders to deliver it up, if Elieston should do him the service in an English affair he then expected; and that the Duke being disappointed, (this is *causa data causa non secuta*.) called for and cancelled it; but Elieston

denied that it was a conditional deposition; and, farther, offered to prove he had done the family of Hamilton good offices. And the LORDS having advised this oath on the 25th of March, they repelled Elieston's defence, and decerned in the non-entry.—Some thought, in these odious casualties, (as non-entry is, *cujus putamina præcidenda putat Cragius,*) *quævis causa probabilis inducit bonam fidem* to assoilzie from bygones, even since citation; as the LORDS have sometimes found.

No 14.

Fountainhall, v. 1. p. 280.

. Sir P. Home also mentions this case :

THE Duke and Dutchess of Hamilton being superiors of the lands of Elieston, pursue a declarator of non-entry against ——— Elies, apparent heir to the deceased Mr John Elies, advocate, and Mr John Elies his grandfather. *Alleged* for the defenders, That the lands were full, in so far as, he being infeft under the Great Seal by the English, who then had right to the estate of Hamilton by forfeiture; and it is declared, by the 15th act of his Majesty's first Parl. in the year 1661, rescinding the Parliaments year 1640 and 1641, &c. that all acts, rights, and securities, passed in any of these meetings, or by virtue thereof, in favours of any particular person, their civil and private interests shall stand good and valid to them; as also, the defender was infeft upon charter granted by the pursuer in the year 1658, as appears by the sasine; and albeit he wanted the charter, yet it was supplied by a letter from the Duke, ordering the defender to be infeft, and the charter is in the Duke's hands. *Answered,* That the estate of Hamilton being unjustly forfeited by the English usurpers, immediately upon the King's restitution, the Duke and Dutchess came to the right of their estate, and the reservation in the act of Parliament is only as to rights of lands holding of his Majesty, where the passing and granting of such infeftments was but an act of administration, but cannot be extended to gifts of lands granted by the superiors whereunto they had no right, the forefaulter being in itself unjust and illegal; as also by the 12th act of the said Parliament, concerning judicial proceedings, it is declared, that all and whatsoever gifts, charters, and other rights, passed in Exchequer, and through the seals, in the usurper's time, may be called in question at the instance of any of the people who may pretend to have been unjustly wronged thereby, and the defender's sasine cannot be sustained to stop the non-entry, because there is no charter produced; neither was there ever any charter delivered to the defender, but the true way how he came to be infeft was, that the defender having undertaken to do the Duke considerable services, by transacting of debts due by the deceased James Duke of Hamilton, the Dutchess her father, to some English creditors, upon whom the defender pretended to have influence, being entrusted by them as their lawyer, and did so far prevail with the pursuers, as that they were willing to enter him if he should procure them compositions, from these

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creditors, equivalent to his entry, and thereupon they did subscribe a charter; and Mr John Elies having written to the Duke, pretending that he would suffer great prejudice if he were not infest, the Duke did write the foresaid letter, and did consent that he should be infest, but the charter was to lie in Robert Hamilton's hand, who was the Duke's ordinary writer, before the defender should procure the composition to the Duke from these English creditors; and the defender not having performed his engagement in getting the compositions to the Duke from English creditors, the Duke did justly cancel the charter.— THE LORDS repelled the first defence; and, before answer to the second, ordained Robert Hamilton to depone if the charter was delivered to him for the behoof of the defender, or on what terms the same was delivered to him, or if he did ever deliver the same to the defender, or back to the pursuer,

Sir P. Home, MS. v. I. No 531.

No 15.

1687. *July.* LAIRD OF POWRIE *against* MARGARET SMITH, &c.

IN a declarator of non-entry against a compriser, it was *alleged* for the defender, That he had charged the pursuer to enter him, and he suspended; and the land must be reputed full since the charge.

Answered; The defender ought to have offered a charter, with the bygone feu-duties, and a year's rent as a composition.

THE LORDS found the answer relevant.

Fol. Dic. v. 2. p. 5. Harcarse, (NON-ENTRY.) No 736. p. 209.

1713. *July 24.*

THE UNIVERSITY OF GLASGOW *against* JAMES HAMILTON of Dalziel.

No 16.

An adjudger having charged the superior to infest him, and made offer of a charter with a year's rent, this was found to put the superior *in mora*, and to make him liable for the full rents, he being in possession by a declarator of non-entry.

THE University of Glasgow having acquired from Bessie Herbertson an adjudication, led at her instance against Mungo Nisbet, of the lands of Shiels, charged Dalziel, superior of the lands, (who was in possession by a declarator of non-entry,) to enter them, and offered him a charter with a year's rent; and, upon his refusal, pursued a mails and duties against the tenants. In which process the superior compearing, *alleged*, That he was not obliged to receive the University for a vassal; because, through that community's not dying, he should be deprived of the casualties of non-entry, escheat, &c. arising from the death or delinquency of a private vassal, which cannot be taken from any superior, without his own consent, by the single deed of his vassal.

Answered for the University, The act 36th of King James III. 5th Parliament, ordains the overlord to receive a creditor, or any other buyer, tenant to him, paying to the overlord a year's mail, as the land is set for the time; and,