

1708. December 21.

No 37.

A declarator of non entry was sustained, though executed within the year, the day of compearance falling without the year.

GEORGE LOCKHART of Carnwath *against* The HEIR of CHEISLY of Kerswell.

GEORGE LOCKHART of Carnwath, being superior of the lands of Cheisly of Kerswell, and likewise a creditor adjudger, he pursues the heir in a declarator of non-entry. *Alleged*, No process, because you not only raised your summons within my year of deliberation, but did likewise execute the same within the year; and though it was to a day of compearance without the year, yet the citation within my privileged time was preposterous and a nimious anticipation, the whole year being indulged to apparent heirs by law. *Answered*, There is nothing more ordinary in practice than to raise and execute the summons within the year, providing it be to a day without it, and charges to enter heir have ever been so executed; and Stair, book 4. tit. 8. § 6. allows the same in the very case of non-entries, which, though they seem penal as a feudal delinquency, yet are more favourable than the ancient feudal law giving the whole rents was, whereas the retoured duty is only payable before citation by our customs.— THE LORDS repelled the allegiance against the execution of its being executed within the year, seeing the day of compearance was without it. But what influenced this decision much was, the pursuer having suffered his summons to sleep for several years; and, having raised a wakening, he passed from all the preceding years, and restricted his non-entry to the date of the execution upon his wakening, and declared he made no other use of his process but only to get payment of the debts Kerswell owed him, though this fell heavy on the creditors. It was started among the Lords, if a summons, whereon nothing had followed but a citation, without any judicial minute of process, could regularly be wakened; or if it did not expire, even as a charge of horning does, if denunciation be not used within the year of the charge; for why should a messenger's execution of a summons last longer than his execution on a horning? Only this difference may occur, that, on a citation in a summons, arrestment or inhibition may be used, and why should they perish by the summons not being called within the year; and why may not a wakening make this revive and convalesce? But this argument seems to yield where no such diligence is done on the dependence, that there it should totally perish. Sir Thomas Craig, in his book *de feudis*. sciews the casualties of superiority too far, because they were anciently gratuitous donations, yet now when acquired for onerous causes, they cannot be so favourable, for *mitiores pœnæ nobis semper placuere*, and the vassal was allowed year and day for applying to his superior to be entered and infest, *ergo* the apparent heir within that space ought not to be pursued.

1709. Dec. 15. GEORGE LOCKHART of Carnwath, being superior to Cheisly of Kerswell, and his lands being affected by his creditors' diligence, he pursues a declarator of non-entry both against him and his creditors. *Alleged*, *imo*, No

process, because your action is raised within the *annus deliberandi* allowed to apparent heirs, and executed within the same, though the day of compearance be without the year, which is a preposterous diligence. *Answered*, There is nothing more ordinary than raising and executing of summonses *intra annum deliberandi*, providing the day you cite him to be *extra annum*. *Replied*, Whatever may be tolerated to sustain ordinary summonses *ad fundandam litem*, yet it can never be extended to odious unfavourable cases, such as non-entries, which are penal. THE LORDS repelled the dilator. *2do*, *Alleged*, I purged the *mora*, in so far as I offered a precept of *clare constat* with a year's rent. *Answered*, *Non relevat*; for I being minor, the offer should have been made to my curators, as well as to myself, and I was not bound to sign your precept; but the legal compulsitor was to run the charges out of the Chancery, which method you took not. THE LORDS repelled the allegiance. *3tio*, *Alleged*, You have adjudged the lands for a debt owing you by the vassal, and so may come in *pari passu*, or made yourself preferable for your expenses, and they were ready to prefer him *quoad* his debt, as far as his diligence would carry him, but it cannot import a consolidation of the property with the superiority. THE LORDS laid hold on an offer made by Carnwath, that he restricted the effect of his non-entry to his summons of wakening, and made no farther use of the casualty of non-entry but singly to prefer him to the other creditors, in so far as might secure the payment of the true sums owing him, viz. principal, annualrent, and debursed expenses; therefore they repelled the creditors hail defences, in respect of his declaration and restriction foresaid; which imported, that, if he had not made this concession, but extended the non-entry to the full, over and above his debt, some of the Lords would not have been so clear to repel the defences. For, when feus were gratuitous donations, it was no wonder that these feudal delinquencies were allowed; but now, these 200 years bygone, they being onerous and bought at a full adequate price of 20 years purchase or thereby. it seemed mighty unfavourable to forfeit a poor vassal upon the matter, for his negligence in not entering *debito tempore*. THE LORDS determined nothing about the year's rent for entering the creditors, seeing that was due by law, and came not to be considered in this process. The heir's own entry was only the duplication of the feu-duty; but the first adjudger or purchaser being a singular successor, behoved to pay a year's full rent, if the superior refused any ease.

*Fol. Dic. v. 1. p. 467. Fountainball, v. 2. p. 473. & 541.*

1710. July 29.

ALEXANDER BAILLIE of Castlecarye, against WILLIAM BROWN of Seabegs.

ALEXANDER BAILLIE of Castlecarye, who is vassal to William Brown of Seabegs, having within a year after his father's decease, served heir to him, and

No 38.

Citation upon a summons of declarator of