1746.

CHALMERS v. ALISON, &c.

" Catanach, was duly qualified to be elected a pro-
" fessor of civil law in the King's College of
" Aberdeen, and was duly elected: and it is also
" ordered and adjudged that the appellant, James
" Catanach, be preferred to the said office accord-
" ingly."

For Appellants, *A. Hume Campbell, E. Erskine.*
For Respondents, *R. Craigie, W. Murray.*

CAPTAIN CHALMERS of Gadgirth, *Appellant;*
PORTER ALISON, *et alii*, his Vassals, *Respondents.*

9 *May*, 1746.

SUPERIOR AND VASSAL.—NON-ENTRY.—Found that vassals who had been in non-entry for upwards of 40 years, were not liable in the arrears of the retoured duties, it being uncertain in whom the right to the superiority of the lands was vested during that period.

[Elchies, *voce* Non-entry, No. 3. Mor. p. 15091 and 9330.]

No. 78.

IN 1692 the estate of Chalmers of Gadgirth was adjudged by his creditors, one of whom, Sir David Cunningham, obtained a charter of adjudication, on which he was infeft in 1693. In 1695, the adjudgers by agreement, divided the estate among themselves; but no mention was then made of the superiority of the lands possessed by the respondents. Thereafter the appellant not choosing to

make up a title to the estate as heir, acquired right to this adjudication by a conveyance from Sir James Cunningham, the heir of Sir David, upon which he obtained a charter from the crown in 1742, and was infeft in Feb. 1743. During all this period, the lands held blanch by the respondents, were in non-entry.

The appellant, having thus established in himself a title to the superiority of these lands, brought a declarator of non-entry to have it found that the lands had been in non-entry for 40 years, and claiming the retoured duties during that period, and the full rents since citation.

In defence it was pleaded, that as it was by the fault of the superior, and the confusion of his affairs, that the respondents were unable to ascertain who their superior was, and to whom they ought to apply for an entry, they ought not to suffer for a supposed contempt by being found liable even in the retoured duties; that the appellant not having made up a title as heir, was not in a condition to enter vassals; and as to the adjudication, he was not thereby entitled to any of the casualties incurred prior to the date of the conveyance, being only then enabled to grant investitures. —That the claim for non-entry, though extended no farther than to the retoured duties, was to be considered penal, and therefore unfavourable in the eye of the law.

It was answered that, in strict law, the superior is entitled, during the non-entry of his vassal, to the full rents of the lands; but that the claim is usually restricted to the feu-duties in feu-holdings, and to the retoured duties in blanch holdings, incurred prior to citation, but extended to the full

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rents thereafter, because then the vassal's contempt of his superior, in neglecting to enter, is the more manifest;—that it was no excuse for not entering that the heir of the superior had not established a title to enable him to give a new investiture, because, in such a case, the law has pointed out a proper remedy by the act 1474, c. 57.

There could be no dubiety as to the superior, for the vassals might easily have known from the record to whom they should apply for an entry. Sir D. Cuninghame, and afterwards his son, being infeft on their charter of adjudication, in the whole estate of Gadgirth, became fully vested in the superiority, and as much entitled to the casualties as the appellant's ancestors had been, from whom the right of superiority was adjudged. It is clear, therefore, that Sir David or his son might have brought the present declarator, and that the defence founded "on the superior's estate being en-"cumbered or adjudged," would not have availed; and if the claim would have been competent to them, it cannot be maintained that the right of superiority, when conveyed to the appellant, is less available in his hands than in theirs.

Although the casualties of superiority are more or less a burden on the vassal, according to the nature of the holding, they are not less the estate of the superior, than the *dominium utile* is the vassal's; and a claim for non-entry is most favourably regarded when it extends to the retoured duties only. Every lawful vassal is presumed to know, that by possessing an estate to which he is not entered by the superior, he subjects himself in the retoured duty yearly, and therefore it is his own fault if an arrear is incurred.

The Lord Ordinary found, (9th June, 1744,) "That in this special case, the defenders are not "liable for either retour or non-entry duties pre- "ceding the date of the pursuer's charter."

Upon a reclaiming petition, the Court found, (19 June, 1745,) "That whereas the petitioner does "not claim the superiority as heir to his predeces- "sor, but as a singular successor, therefore ad- "here," &c.

The appeal was brought from the interlocutors of 9 June 1744, 19 and 29 June 1745.

Entered, Dec. 10, 1745.

Pleaded for the Appellant.—Although the law of Scotland is indulgent in admitting excuses to mitigate the superior's claim for his non-entry duties, when that is made for the full rents of the estate, yet, in all cases, the vassal continuing in non-entry, is subjected in the retoured duties, which are only a part of the real profits of the estate. It was of no consequence, that the appellant claimed these duties as a singular successor, it being immaterial to the vassal, whether the superior was served heir to his ancestor, or acquired his right to the superiority by singular titles. His title to the estate in either case, and that of his authors, were unexceptionable; and, therefore, notwithstanding the confusion in the affairs of the family of Gadgirth, the respondents could never have been at a loss to know their true superiors.

Pleaded for the Respondents.—Where the non-entry is occasioned by the fault of the superior, or where, from any circumstances, the superior is uncertain, nothing is due by a vassal in respect of his non-entry; and in the present case, the appellant and his father, the apparent heirs in the superiority, were in no condition to have entered the

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respondents previously to the charter and infeftment in 1743. Until that period, it was uncertain in whom the superiority was vested, whether in the apparent heir of the family of Gadgirth, or in the adjudgers of the estate; among the adjudgers themselves, it was uncertain who had the greatest interest in the superiority, neither did it appear from the agreement in 1695, that it had been allotted to any of them in particular. This uncertainty is a sufficient defence against the consequences of non-entry.

As to the argument on the statute 1474, c. 57, this act does not apply to those cases where the superior is uncertain; and, moreover, the object of it was to afford to the vassal relief against his immediate superior, who refused or neglected to enter him, but it was not intended to give any benefit to the superior, who was himself unentered. Although the vassal therefore may not urge the forfeiture, he is not thereby subjected to any claim at the instance of his superior, to which the latter would not have been entitled independently of the statute; and least of all to a claim for the non-entry duties, when the superior himself was not in a condition to have entered the vassal.

Judgment, 9 May, 1746.

After hearing counsel, "it is ordered and adjudged, &c. that in the interlocutor of the Lord "Ordinary, after the words, ('that in this special 'case,') these words, ('it appearing that before the 'charter granted to the appellant, it was uncertain 'in whom the right of superiority of the lands in 'question was vested,') be inserted, and that in the "interlocutor of the Lords of Session of 19 June, "1745, these words, ('find that whereas the petitioner does not claim the superiority as heir to

'his predecessor, but as singular successor, there-
'fore,') be left out; and it is hereby farther or-
"dered and adjudged that with these variations,
"the several interlocutors complained of be af-
"firmed."

For the Appellant, *W. Grant, W. Murray.*
For the Respondents, *Al. Forrester, Ch. Areskine.*

ALEXANDER GARDEN of Troup, - *Appellant;*
THOMAS RIGG of Morton, Advocate, *Respondent.*

28 January, 1748.

PRESCRIPTION. — INDEFINITE PAYMENT.

Two bonds due to the same party being prescribed, and the debtor in them having made an indefinite payment "to accompt," during the currency of the prescription, it was found that the prescription of both bonds was not thereby interrupted, but that the debtor might impute the payment to either of them.

ANNUALRENT.—Interest found to be not due upon a missive not bearing a clause of interest.

PERSONAL OBJECTION.—A bill of exchange being so framed as to afford a legal objection to its validity, it was found that the acceptor, having been confidential lawyer to the drawer, was barred *personali objectione* from pleading the objection.

BILL OF EXCHANGE.—Bills of exchange having lain over for twenty-eight years, without protest or demand, it was found by the Court of Session, that no action lay upon them, unless supported by the acceptor's oath upon the verity of his subscription. *Reversed* on the circumstances of the case.

[Elchies *voce* Prescription, No. 25; *voce* Advocate, No. 1; C. Home. Falc. Kilker. Mor. 1628, 10450, 11274.]

ARROT lent Rigg several sums of money, on the following among other documents: 1st, A bond

No. 79.