

in heritage to the defender, given be our Sovereign Lady; it was *alleged* be the persewar, That the said lands had been in non-entries be certain years in our Sovereign Lady's hands, whilk non-entries were disponit to the said persewar, who desirrit the same to be decernit in non-entries conform to his gift. It was *alleged* be the said defendar, That the said lands pertened to him heretable, and if so had been that the said lands had been in non-entries, as is lybellit, yet he had obtained ane gift of our Sovereign Lady of the non-entries of all the said lands, the space that the said lands had been in non-entries before the date of the said gift, and ay and while the entrie of the righteous air thairto, and had been in possession of the said lands, be manuring, and uptaking the mails and duties of the same, long before the date of his gift, or the time of the same. It was *answered* be the persewar, That his gift was made to him two years before the date of the defender's gift; and *alleged*, that *donatio principis transfert dominium* incontinent after the date of the said gift, without any other and real possession, as was *alleged* could not serve without there had been ane decret of non-entries decerned, be the whilk he came in possession. It was *alleged* be the said defendar, That albeit the persewar's gift was befor his, notwithstanding it was never intimated to him, nor summons raisit thairupon, sua that the said defender was not obliged to know the same; also, he needit no decret to decern the said lands in non-entries in his favours, because the heritable right of the same lands pertentit to himself, and he could not call himself to that effect; but the real possession of the same was enough to him, conform to his gift, notwithstanding the naked gift was given to the said persewar before his, without real possession following thereupon; whilk allegiance for the defender was admittit be the LORDS, and obtained an absolvitor of the said non-entries be decret of the LORDS, notwithstanding the allegiance of the persewar.

*Fol. Dic. v. i. p. 349. Maitland, MS. p. 173.*

\* \* \* Balfour reports the same case:

THE heritabill possessour of landis being in possessioun thairto, and obtenand the gift of non-entres, aucht and sould be preferrit to all uther persounis obtenand ane uther gift of non-entres of the samin landis, ather after his gift or befor the samin, gif the time of the obtaining of his gift he was in *bona fide*, and na intimatioun of ane priour gift maid to him, or ony summoundis raisit aganis him conform thairto.

*Balfour, (NON-ENTRY.) No 11. p. 259.*

1568. April 2. ARCHIBALD LOCKHART *against* JA. LOCKHART.

No 7.

GIF divers giftis of non-entres of the samin landis be disponit to sindrie persounis, and the first donatour raisis first summoundis aganis the tenentis be ver-

No 7.

tue of his gift, zit nevertheles the last donatour sall be preferrit to him, gif he maid lauchful intimatioun to the tenentis of his gift, befor the executioun of the summoundis raisit at the instance of the first donatour.

*Fol. Dic. v. 1. p. 349. Balfour, (NON-ENTRY.) No 14. p. 260.*

1681. June 24.

OSWALD against CATHCART.

No 8.

A donatar pursuing for non-entries, a charge upon an apprising without the offer of a charter and an year's rent, was not sustained to exclude the non-entry duties.

JAMES OSWALD, as donatar to the non-entry of some tenements in Prestoun, pursues declarator thereon. It was *alleged* for Daniel Cathcart, That he had apprised the same tenements, and charged the superior to enter him; so that the superior being in the fault in not obeying the charge, he nor his assignee the donatar could not claim the advantage arising by his fault; likewise a charge is always equiparate to an infestment. The pursuer *answered*, That though a charge be sufficient to prevent posterior rights, yet it can never prejudge the superior of his casualties by his former vassal, who remains undennuded, seeing the charge would not make the appriser liable to these casualties; neither was the superior in the fault, unless the appriser had presented him a charter, and paid the bygone non-entry, and offered him a year's rent, either of the land, or the money in the apprising, as the Lords have oft-times sustained, both in the case of ward and non-entry.

THE LORDS found the charge did not exclude the superior, unless a charter and a year's rent had been offered, but found no necessity to offer the bygone non-entries.

*Stair, v. 2. p. 884.*

*See NON-ENTRY.*

*See APPENDIX.*