No 33.
er by the public enemy, and remained prisoner all the time libelled.

lands came in non-entries, and the gift thereof disponed to the pursuer, by reason of the act of the field foresaid, at the which the defender was taken prisoner, and holden thereafter long in England, in which time he might not pursue his action to compel the superior to enter to the superiority of his lands, nor yet might enter himself to the same, for the causes foresaid; wherefore the said pursuer had no just action to pursue the said non-entry during the space that the said defender was prisoner, as said is; which allegeance and exception was admitted, and *absolvitor* given to the said defender against the said pursuer.

Fol. Dic. v. 2. p. 6. Maitland, MS. p. 114.

1635. *January* 29. MONCRIEFF *against* L. BALNAGOWNE.

No 34.
Sub-vassals were found liable for the full rent, not their feu-duty only, from citation in an action of mails and duties, at the instance of the superior, although they had received no previous warning to remove.

MR ARCHIBALD MONCRIEFF having a pension granted by the King, out of the blench or feu-duties payable to the King by L. of Balnagowne, out of the lands of ——, which were erected to Balnagowne in a barony, the lands of old being of the abbacy of Ferne, and diverse of these lands so erected, pertaining to others, who had the property thereof feued to them; and others of the lands pertaining in property to Balnagowne's self, who by the erection of the whole, became superior to the other feuers; and the said Mr Archibald Moncrieff having obtained decreet against the L. of Balnagowne, as apparent heir to his father, who was addebted in that duty to the King, out of which his pension was gifted to be paid, decerning the ground to be poinded therefor; the said decreet being given against him, only as apparent heir to his umquhile father, and not as heir, nor infeft, nor as charged to enter heir; and upon the said decreet, having comprised all the lands, as well pertaining to the Laird as to the other feuers, for not payment of the pension which he had, as said is, out of the feu-duties, and which were owing to him of diverse years, for which he had deduced the comprising, and obtained the said sentence; he pursues the L. Balnagowne, and the possessors of the lands comprised, for the mails and duties thereof. And the defender *alleging* the comprising to be null, because it was deduced against him, as apparent heir only, he neither being decerned as heir, nor as lawfully charged to enter heir, nor as infeft; the LORDS repelled this allegeance, and sustained the decreet and comprising, especially in respect of the same standing unreduced, which the LORDS found they could not annul in this summons so summarily, by way of exception, albeit the alleged nullity had been in itself relevant; as also the LORDS thought it not relevant, even albeit it were in a reduction; for they thought and found, that a decreet to poind the ground might well be decerned against one called to represent the party debtor deceased, only as naked apparent heir, and that the comprising might be so deduced thereupon, for a defunct's debt, against him, albeit neither infeft, nor being heir, nor charged to enter heir. Yet this would appear

No 34. to have some difficulties, that a decreet can either be given, or an apprising deduced thereon, for a defunct's debt, against any person who represent's not the defunct, by charge to enter heir to him, or some other ways; for personal execution could not be granted otherwise against him. And where it may appear that this decreet and execution is more against the ground than against the person, and for a debt wherewith the ground is affected, and so *transit contra quemcunque quoad fundum*; it may be *answered*, that the feu-duty, and the poinding therefor, may well affect the ground; but for the not-payment thereof, it would seem that the property cannot be comprised, but from the party that may be convened, and is subject in the debt, as the apparent heir cannot be. It may be *answered*, Why may not here the ground be comprised, as well as in non-entries after general declarator, which proceeds against the apparent heir to the defunct, and the lands will be comprised against the apparent heir, after the profits of the lands are liquidated and decerned. Whereto it is *replied*, That this is not alike; for in non-entries the sentence is tried against him, who only should and may enter, finding that the lands are in non-entry, and that the superior wants a vassal, wherein no other can pretend interest; and that is inherent in the nature of the holding, that the property may be so challenged by the superior, for the vassal's contempt, in depriving the superior of a vassal, which justly in place of a vassal to serve him, gives the lands to supply that want, which cannot be declared against any other, but him who is apparent heir, and he the cause of the failzie; for it is for his own fault, that is for his non-entry, he wants that land; but in the other case, the not payment of the feu-duty may give the superior right to poind the ground therefor, *contra omnes*, but not to comprise the property, but against one cloathed with a right, or called as representing *in jure* the right of the defunct; for when lands are decerned in non-entry, and thereafter profits specially proved and decerned, of necessity the superior must comprise therefor, because there is no other person as pretending right thereto, who could by any possibility in law be decerned to pay the same; therefore sentence and comprising of necessity must be executed against the ground, to the which no other can have claim, and for which no other can be convened; but in the other case it is not so, for there is possibility of personal payment, if any were cited legally therefor as heir, or charged to enter heir, *quo casu* for not entering or renouncing, adjudication or comprising may go on orderly; but in non-entry this is needless, because of the nature of the holding, and special privilege of the superior granted in law.

Act. *Nicolson.* Alt. *Advocatus, Stuart & Gibson.* Clerk, *Gibson.*

1637. *March* 1.—MENTION is made of this cause January 29th 1635, where it being *alleged*, That these sub-vassals who were convened for payment of the mails and duties of these lands, could not be further convened but for the feu-duty contained in their infeftments, wherein they were obliged to the Laird of

Balnagowne, the King's immediate vassal, and their superior, and which they had paid to him these many years bypast; so that for bygones their infeftments and possession had *bona fide* ought to liberate them from all pursuits, for any greater duty acclaimed for these lands; especially seeing neither the sentence, which is the ground of the comprising, nor the comprising itself, are deduced or given against them, nor they ever called thereto; this allegeance was fouud relevant, for all the years preceding the citation, by virtue of this summons; and this same allegeance being proponed by the defenders, who *alleged*, That they ought to be liberated from this pursuit for the whole mails and duties acclaimed, except the said feu-duty contained in their infeftments, as said is, because they ought to bruik continually, for payment of the said feu-duty, ay and until they be interrupted by a warning to remove from the lands; and where it was *replied*, That the citation by his summons was a sufficient interruption to make them liable for the duties of the lands ay since syne; he *answers*, That that ought not to be found a lawful interruption, no more than if he had been possessor, after an expired tack, *per tacitam relocationem, quo casu* a pursuit for the mails and duties of the lands would ever have been excluded for any greater quantity, except for the old duty accustomed to be paid, unto the time warning had been made to remove, and such a summons would never have been found a lawful interruption; far less in this case ought this summons to be sustained for an intimation against them, who had heritable rights, for a feu-duty, which they have ever been in use only to pay, and which ought to maintain them, without payment of any greater duty, ay and until they be warned; for there is nothing before warning, that can constitute them debtors of a greater duty, seeing they cannot be found in a worse case by their heritable rights, than if they had bruiked it without any right, *per tacitam relocationem*, as said is, especially where there is neither sentence against them, nor comprising from them. This allegeance was repelled for all years, since the citation in this pursuit, which was found a sufficient interruption, and no necessity was found of a warning. Further it was *alleged*, That this comprising, without either infeftment, or sasine, or diligence to obtain sasine, ought not to produce this action against them for mails and duties. This allegeance was also repelled, attour it was *alleged*, That this pursuer had received from the other vassals, as many feu-duties as would pay the blench duties of the bygone years, in so far as the legal reversion was expired, of certain of the lands comprised, against diverse of these feuars, by the which expiring, the property pertained to the pensioner, which property was of a far greater worth, by a triple or quadruple, more than all the bygone duties, for which the pensioner had deduced the comprising. This allegeance was also repelled, in respect the pursuer's procurators were content, that they being paid of all the bygones of the said pension, that the comprising should expire, and be found as redeemed; likeas all these allegeances were specially repelled, because this pursuit was deduced by the King's right, for payment of the feu, or blench duties,

No 34.

No 34. addebted by his own immediate vassals, who could not make any subaltern right, which could prejudge the King, or his pensioner, to poind or comprise the lands for the said feu-duty, and which he might seek from his own vassal, without necessity to take notice of any right flowing from him to his sub-vassals.

Act. *Nicolson & Mowat.* Alt. *Advocatus, Stuart, & Gibson.* Clerk, *Hay.*

Durie, p. 746. & 833.

1675. *February* 17. STUART *against* LORD FORRESTER.

No 35.
A gift of non-entry granted before the casualty fell, and a general declarator thereon, were found a good title, after the casualty fell; but full mails and duties were found due only from the time of the superior's concurrence.

THE deceased Earl of Murray gave a gift of non-entry of certain lands held by him of the Earl to George Stuart, who many years since raised a general declarator, and now insists thereon. The defender *alleged* absolvitor, because the gift of non-entry was granted when it was not vacant, the lands being then full. The pursuer *answered*, That albeit the not vacancy be a sufficient reason to annul gifts obtained from the King, as surreptitions, or obreptitious and hurtful to the Crown, by granting of gifts by anticipation, before the casualties be vacant; yet this holds not in the case of subjects, *quia debent sibi invigilare*; so that the casuality occurring thereafter accreses to the donatar. 2*do*, This is *jus tertii* to the defender, and this present Earl of Murray concurs. It was *replied*, That whatever might be pretended, if the casualty had become vacant during the life of the granter of the gift, it can never be extended to those occuring after his death; and as to the concourse, *non relevat*, unless this Earl give a new gift; and the defender had good interest to propone this defence, because if the gift and declarator should stand, he would be liable for the full mails and duties from the date of the citation, by the space of 15 or 16 years.

THE LORDS found that the gift or declarator could have no effect until the concourse of this Earl of Murray, and therefore sustained the same only from the time of the concourse, but not to infer mails and duties from the citation.

Fol. Dic. v. 2. *p.* 6. *Stair, v.* 2. *p.* 323.

1675. *June* 23. DOUGLAS of Kelhead *against* CARLYLE and Others.

No 36.
A superior having assigned his right to the non-entry of lands, the full duty was given, not from citation, but from the date of production of the assignees title.

KELHEAD pursued a declarator of non-entry, pretending that he was superior of the lands libelled; in which process, it was *alleged*, That he was not superior of the said lands, in respect the right libelled, that he had from my Lord Queensberry, was to be holden of the disponer; and Queensberry being superior to the defenders, could not interpose another betwixt him and them; and upon the proponing of the said allegeance, the pursuer was forced to reply upon a right to the casualties granted by a paper apart by my Lord Queensberry to the pursuer; and thereupon process was sustained, and decreet given for the retoured duty before the intenting of the declarator, and the full avail