

1666. July 25. Mr JOHN HARPER *against* HAMILTON.

MR JOHN HARPER pursues a declarator of non-entry against Hamilton, his vassal, who *alleged*, That he was only liable for the retour mails, till the decret of general declarator was obtained. It was *answered*, The common custom was, that from the citation in the general declarator, mails and duties were due in the special, because the general declarator declares the non-entry since the date of the summons, and so the mails and duties are not due from the date of obtaining the decret, but from the years decerned therein, which is from the date of the summons.

THE LORDS found the mails and duties due since the time of the citation, and not only since the time of the sentence.

Fol. Dic. v. 2. p. 5. Stair, v. 1. p. 402.

* * * Dirleton reports this case :

IN the case of Mr John Harper *contra* Hamilton his vassal, it was *decided*, that after the intenting a general declarator of non-entry, the vassal should be liable not only for the retoured duty, but for the ordinary mails and duties of the land; though some were of the opinion, that before sentence the vassal should only be liable for the retoured duty.

Dirleton, No 28. p. 13.

* * * This case is also reported by Newbyth :

MR JOHN HARPER of Camrathan, advocate, as superior of the land of Nethertherton, pursues a declarator of non-entry against Patrick Hamilton, for the non-entry duties, and for the mails, farms and duties of the lands; which action being called, it was *alleged* for the defender, That *quoad* all terms preceding the citation, there could be nothing decerned but the retoured duties, and *quoad* the terms subsequent, the defender is content to enter, having already taken out brieves for that effect. To which it was *answered*, That *quoad* the Whitsunday's term subsequent to the citation, the defender ought to be liable to the half of the full mails. To which it was *replied*, That the rent of the lands being vic-tual duly, which is not payable till betwixt Yule and Candlemas, after the separation of the crop from the ground, the defender ought to be admitted to purge at any time before sentence; likeas, the defender is content to enter betwixt and the 1st of November, at least being served, shall do diligence against the superior for that effect; and seeing the pursuer must prove both the quantity of retoured mails, and the number of the terms expired since the decease of the last infest, and so cannot have sentence this session, he ought to have no

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In a declarator of non-entry the full rent is due from citation.

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more before sentence but the retoured mails; and further, he is content instantly to take a precept of *clare constat*, and to pay the reasonable expenses of his service and retour. THE LORDS found, that the superior should have the mails and duties after the raising the summons of declarator, and that they would decide so in all time coming in the like cases.

Newbyth, MS. p. 80.

1671. *January 30.*

DOUGLAS of Kelhead *against* The VASSALS of the Barony of Kelhead, and Others.

No 24.
Found in
conformity
with Harper
against Ha-
milton, *supra*.

THE Earl of Queensberry being superior to certain vassals of the barony of Kelhead, who did dispoise the feu-duties and whole casualties of the superiority to Kelhead his brother, to the effect that Kelhead might be his immediate vassal, and that the feuers might hold of Kelhead; whereupon Kelhead was infeft holding of Queensberry, and thereupon pursues a declarator of non-entry, both generally and specially in the said summons; it was *alleged* for the defenders absolvitor, because they were not the pursuer's vassals, for albeit he was infeft holding of Queensberry, to the effect he might become their superior, yet that infeftment was null, because no superior could interpose any person betwixt him and his immediate vassal; likeas, the non-entry could only infer the feu-duty till decret or declarator were pronounced, which used to be *per se*, but here both special and general declarator being joint, could only conclude the feu-duties for bygones till litiscontestation.

THE LORDS found that albeit the pursuer's title upon his infeftment, by which he was interposed was invalid; yet seeing it contained a disposition and assignation to the feu-duties, and casualties of the superiority, that the pursuer had sufficient title thereby, as donatar by Queensberry the superior; and found that the non-entry carried only the feu-duty before the citation, but after the citation the whole profits, seeing the vassals did not upon the citation, obtain themselves infeft by Queensberry. *See SUPERIOR AND VASSAL. See No 12. p. 9292. & No 36. p. 9318.*

Fol. Dic. v. 2. p. 5. Stair, v. 1. p. 710.

* * * Gosford reports this case :

1671. *January 29*—IN the action of declarator, (*see* No 12. p. 9292.) at Kelhead's instance against his Vassals, it was *alleged*, That the special declarator for the mails and duties could not be sustained, but from the date of the act of litiscontestation; seeing there was no decret of general declarator, and that it was found that the pursuer had no right as superior, but as assignee, to the bygone non-entries. THE LORDS, notwithstanding, did sustain the special decla-