No 11. by the donatar, is obliged to warrant the charter, and will be forced to give him a new charter, whereupon he may be seised. This was repelled; for the party may charge him to enter him, and, if he lie un-entered by the superior's default, it will have its own consideration against the non-entry, but not the default of the vassal, if he charge not the superior to receive him.

Act. *Advocatus & Lawtie.* Alt. *Stuart & Burnet.* Clerk, *Gibson.*
Fol. Dic. v. 2. p. 4. Durie, p. 511.

*** Auchinleck reports this case:

1633. *July* 3.—JAMES HAY of Tourlands having a disposition granted to him by the Laird of Glencairn, of the superiority, and whole casualties pertaining thereto, of Corsbie and Muirbroke, and, &c. pertaining in property to Crawford of Auchnames, pursues him for the non-entry of the said lands. It was *alleged* for Auchnames, That there can be no non-entry declared from the year 1584, till the year ——, by the space of 38 years or thereby, because the defender's goodsire received a precept of *clare constat* from the said superior pursuer, conform to which he took sasine in *anno* 1600, which sasine must be drawn back to the date of the precept, seeing the superior was denuded of his right to the non-entry by granting of the said precept. To which it was *replied*, That the granting of the precept purges not the non-entry, so long as the vassal is not seised; which reply the LORDS found relevant, and repelled the exception in respect thereof.

Auchinleck, MS. p. 138.

No 12. A superior disponed to a donatar all non-entries. The gift was intimated. The vassal's requisition of the superior to enter him without offering the bygones to him or the donatar, freed him from all subsequent full duties.

1671. *February* 10. The Laird of KELHEAD *against* CARLYLE.

IN the action of declarator (See No 24. p. 9306.) at Kelhead's instance against Carlyle of Brydekirk, it being *alleged* for the defender, That he having required Queensberry, his superior, to enter him after requisition, he could only be liable for the retour duties; it was *replied*, That the requisition ought to have been made by presenting a charter and precept, and offering to satisfy all that was due to the superior; at least the bygone non-entries should have been offered to the pursuer, who was donatar, and had intimated his right; and thereupon should have required him to obtain a charter and precept subscribed by the superior his author.—THE LORDS did sustain the defence to free the defender from the full duties, after the requisition; and found, that the pursuer only having a personal right by assignation to the non-entries, the vassal was only obliged to require his lawful superior, and that the not offering all bygones to him, who had assigned the same to the pursuer, could not prejudge the defender, who was liable to the donatar for bygones, and therefore the

superior having no reason to refuse to enter him, nor declaring his unwillingness to subscribe a charter and precept, when it should be presented, the vassal was not thereafter liable *ob contemptum* to the full duties of the lands. No 12.

Fol. Dic. v. 2. *p.* 5. *Gosford, MS. No* 333. *p.* 152.

1678. *July* 18. FULLERTON *against* DENHOLMS.

No 13.
Precepts of *clare constat* are voluntary, and the superior cannot be *in mora* for refusing them. Non-entry duties therefore run, till the heir be retoured, and get precepts out of Chancery requiring the superior to infeft.

JOHN FULLERTON, as donatar to the non-entry of the lands of Straiton, holden of William Stodhart, pursues declarator of non-entry against Catharine and Marion Denholms, who *alleged* absolvitor, because the lands are holden feu, and they offer the feu-duties with a precept of *clare constat*, whereby they shew themselves desirous to enter, and were neither in contempt nor contumacy against their superior. It was *answered*, *Non relevat*, unless they were retoured heirs, and had precepts out of the chancery. It was *replied*, That they were called in this process as apparent heirs, and so were acknowledged by the pursuer, and it needed not to be instructed by a retour.

THE LORDS repelled the defence, and found the non-entry to run till the superior was required to enter upon the retour, and that a precept of *clare constat* is a favour which the superior is not obliged to grant. See SUPERIOR and VASSAL.

Fol. Dic. v. 2. *p.* 5. *Stair, v.* 2. *p.* 636.

*** Fountainhall reports this case:

July 17.—IN a declarator of non-entry, *alleged* they had offered a precept of *clare constat* to their superior. *Answered*, He was not bound to subscribe it, because they were not served heirs.—THE LORDS found the lands in non-entry only *quoad* the retoured mail.

Fountainhall, MS.

1684. *March.* DUKE of HAMILTON *against* MR JOHN ELIES of Elieston.

No 14.
A simple charge is not sufficient to put the superior *in mora*. See No 30. p. 6911.

IN a declarator of non-entry, at the instance of the Duke of Hamilton against Mr John Elies of Elieston, for mails and duties since the raising of the process in the year 1672, and the retoured duty in the year 1660;

Alleged for the defender; The lands are full, 1*mo*, By infeftment upon a charter granted by the usurper; 2*do*, By a charge of horning given to the Duke by the defender upon an adjudication.

Answered, 1*mo*, The charter from the usurper cannot defend after the King's restoration, when the Duke of Hamilton is restored to the superiority, which was taken away by the English; 2*do*, The giving of a charge of horning is