

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.

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

No 12.

1678. July 18.

FULLERTON against DENHOLMS.

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.

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, *imo*, By infeftment upon a charter granted by the usurper; *2do*, By a charge of horning given to the Duke by the defender upon an adjudication.

Answered, *imo*, 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; *2do*, The giving of a charge of horning is

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.

No 14.

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