declaratoria juris, which doth not give, but declare the superior's right to the duties. As to the second head, if there were any specialty in this case, as to the mails and duties, they must belong to the King and his donatar, as *bona vacantia*; for though of old, all moveables were allodial, *et cedebant occupanti* where they were *nullius*, and as to some moveables do so continue, yet, by the law and custom of all Princes and States, they have redacted *bona vacantia quæ sunt nullius in publicum ærarium*, as treasures, wreck, weath, &c. for they could defray public expenses no easier way, than by attributing thereto *ea quæ sunt nullius*; and in this case, such tailzies being now ordinary, and passing of course in Exchequer, if non-entry take no place, the King may be excluded from all casualties, if he have no right to the fruits, as *bona vacantia*. It was *replied* for the defender, That neither the reasons nor instances adduced import any thing as to the fruits; for there is nothing more certain, than that non-entry is not extended beyond the retoured duties, unless the vassal be contumacious; as if the apparent heir be *in utero*, though the non-entry might extend to the retour duties, or though the retour were reduced as null *ab initio*, the feu would be in non-entry; but was it ever sustained to reach the full rents from the citation of the general declarator, but only from the reduction of the retour; and, therefore, any probable ground to excuse contumacy doth always restrict the non-entry to the retour duties, and defends, in the special declarator, the fruits for the apparent heir; and, therefore, in this case, there being no pretence of contumacy, but an heir offering to enter, and holden out upon pretence of possibility, the matter is entire, as to the mails and duties, by the reservation in the former decreet, which certainly hath moved the Lords to grant that reservation. No 37.

THE LORDS found the estate of Leven in non-entry, and that the King had no right to the fruits, as *bona vacantia*; but seeing the heir was debarred from entering, and was neither *in culpa* nor *mora*, they have found the non-entry not to extend to the mails and duties; but found the same to be *in hæreditate jacente*, to be managed by the *curator bonis datus*.

Fol. Dic. v. 2. p. 6. Stair, v. 2. p. 545.

1687. *July.* DUKE HAMILTON *against* LADY CALLENDER.

No 38.
Tenants who had *bona fide* paid to a liferentrix, were assoilzied from all bygones, and decerned to pay, only from the date of the decree of declarator.

IN a special declarator, at the instance of the Duke and Dutchess of Hamilton against Lady Callender, to whom, as liferentrix of the lands of Mumrels, the tenants had made payment *bona fide*,

Alleged for the defender: He could not be liable as intromitter, in respect the Duke, as a party engaging for her, and consenting in her contract of marriage, and one at whose instance execution was appointed to pass, was bound

No 38. to have seen her sufficiently secured in the jointure-lands by a public infeftment, especially himself being superior. But the pursuer may recur against, and recover payment from my Lord Callender's heir, who is liable to the defender in warrandice.

Answered; The Duke is but a bare consenter in a contract of marriage, which he with other relations subscribed for decency, without design to prejudge any rights in their own person. 2*do*, The Duke is but a consenter with, and on the part of the defender, as to her obligement for the tocher; and so his consent cannot be obtruded as to any obligement performable by the husband. 3*tio*, The clause ordaining execution to pass at his instance cannot make him liable to do diligence.

THE LORDS decerned. and declared the non-entry since the citation in the general declarator, to be the full mails and duties, and repelled the defences proponed for the Lady Callender; and found, That her offering a charter with a composition, would not stop the non-entry; because the Duke was not obliged to (receive) her, she not being the vassal, but in the case of a singular successor.

Thereafter it was *alleged* for the defender; That my Lord Linlithgow, the heir of line, was not called, nor any decerniture against him.

Answered; There was an execution against the heir of line, which had fallen by, and is now produced; and the pursuer may extract a distinct decreet against him when he pleases. And in the case of the Marquis of Queensberry *contra* Earl of Annandale, No 69. p. 2210., the Lords sustained a declarator, though the heir was not called, but only the heritable possessor; besides, here the lands are tailzied to the Lord Callender, who is called and decerned.

Replied; By our constant practique the heir of line is called in non-entry; and the cited decision hath a speciality. 2*do*, My Lord Linlithgow's name is scored in the summons, and so no decreet can follow thereon.

THE LORDS found the decreet null.

Harcarse, (NON-ENTRY.) *No* 734. *p.* 208.

*** Sir P. Home reports this case.

The Duke and Dutchess of Hamilton, superiors of the lands of Mumrels which is of the estate of Callender, having obtained a general declarator of non-entry, declaring the lands to be in non-entry since the decease of James Earl of Callender, and having pursued a special declarator against the tenants; *alleged* for the defenders, That they ought to be assolizied, because they had *bona fide* made payment to Lady Callender, who stood infeft in the lands in liferent; and it was *alleged* for the Lady, That albeit her infeftment was but a base infeftment not confirmed, yet the pursuers could not obtrude the want of confirmation, because they were consenters to her contract of marriage, by which

No 38.

she was to be publicly infeft, and secured in her liferent provision, and execution was to pass at the Duke's instance, for fulfilling of the contrsct in favour of the Lady, so that it was the Duke's fault, that the Lady was not publicly infeft. *Answered*, That the tenants after citation upon the general declarator, were *in mala fide* to pay the rents to the Lady, but they either ought to have retained the same in their own hand, or suspended upon double poinding, and the Lady's infeftment, being but a base infeftment, as also Earl Alexander her husband's infeftment being but base and not confirmed, the lands were in non-entry, since the decease of Earl James, who was last publicly infeft; and the pursuers were consenters to the contract of marriage, because the Dutchess was a near relation, and the Duke was obliged for the portion, and the pursuers consent to the marriage, and execution being appointed to pass at the Duke's instance for fulfiling the obligements thereof in favours of the Lady, did not prejudge them of the causualties of superiority, seeing *hoc non agebatur* by the foresaid contract, that the pursuer should confirm Earl Alexander the husband's base infeftment of the property, and the Lady's infeftment of the liferent *gratis*. THE LORDS repelled the defence proponed by the Countess of Callender, in respect of the reply, and sustains the declarator of non-entry, since the death of James Earl of Callender, till the citation of the general declarator, for the feu duties, and from that time, for the full rents of the lands, but assolizied the tenants for all bygone mails and duties paid, preceding the date of this interlocutor, providing they prove payment of the same by writ; and decerned the tenants in time coming.

Sir P. Home, M.S. v. 2. No 825.

*** Fountainhall's report of this case, in No 70. p. 2211. *voce* CITATION.

1704. *January* 13.

EARL of LAUDERDALE and ALEXANDER MAITLAND *against* ALEXANDER BRAND.

No 39.
A vassal found liable for the full mails and duties, only from the date of the decree, finding his lands to be in non-entry, because he had reason to doubt if the pursuer of the declarator was his true superior.

LORD REGISTER reported the Earl of Lauderdale and Mr Alexander Maitland, his brother, *contra* Alexander Brand of Baberton, or Redhall. Lord Lauderdale as superior of Easter and Wester Hailes, pursues a declarator of non-entry of these lands against Redhall, as being in his hand ever since the death of the vassal's father, which was in 1670; and he offering to prove the lands were full, and a term assigned him, the same was circumduced against him, and the decreet goes forth for a great sum, the rent being libelled at random to be 4000 merks *per annum*: And he being charged thereon, gives in a bill of suspension on, these reasons, That the decreet was intrinsically null for want of probation; 1*mo*, Because his father's death being libelled to have been in 1670, it was not proven; 2*do*, Neither were the rents of the lands nor his intromission proven.