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.

No 39. *Answered*, He opponed his decreet *in foro contradictorio*, where all these particulars being specially libelled, a defence was proponed without denying them, which tacit concession relieves the pursuer *ab onere probandi*; 2*do*, *Alleged*, Before citation the superior has no right to the full mails and duties, but only to the retoured duty, and yet the decreet is extracted for the whole; 3*tio*, The lands do truly hold of the King; and though they did not, yet my Lord Lauderdale cannot quarrel it, seeing he was chancellor of the inquest that retoured these lands to be holden of his Majesty. *Answered*, These defences were competent and omitted, and now are not receivable; and it were a jest to wheedle the Earl out of his superiority by such an imposition, whereby, through mistake, he sat on your inquest, and retoured the lands wrong; neither can this be construed as a design to divest himself of his undoubted right. The question here was only, if the bill of suspension should pass? and the Lords thought the reasons sufficient for that, though it was a decreet *in foro*, the import whereof they would consider at discussion. But he craving it to be passed without caution or consignation, in regard it was for a vast sum, and such casualties are odious, the Lords refused it in that manner, but allowed him to find what caution he could, and in supplement to consign a disposition of his estate, which is better security than juratory caution; but if the charger think himself delayed he has it in his option to discuss the cause summarily on the bill if he please.

1705. *February* 14.—The Earl of Lauderdale against Brand of Redhall. In this cause the Earl having opponed his decreet *in foro* against the defender's allegeance, that he was not his vassal, but that the lands held of the King, as mentioned *supra*, 13th January 1704; and there being no probation in it of the time of the last vassal's death, who stood infeft, nor of the quantities which were libelled at the double of the true rent, the Lords allowed them to be heard as if they were in a libel, who was the true superior? By a charter of confirmation in 1449, it appeared, that they held of the abbacy of Dunfermline; but when the monastries came to be forsaken in the beginning of the Reformation, there is a charter of them given by King Henry and Queen Mary, to Murray of Touchadam, or Polmais; and by the act of annexation in 1587, these lands with the rest were annexed to the crown; and about the 1591, Maitland Lord Thirleston got a right to them; but the vassals had it in their option, either to hold of the lords of erection or of the King; and Redhall contended, that his authors, notwithstanding of the right given to Lauderdale's predecessors, yet they still continued to hold of the crown; and that, in 1628, the Earl of Lauderdale had surrended his teinds and superiorities to King Charles I. as well as other titulars and lords of erection did; and this Lauderdale was chancellor to Redhall's service, retouring him to hold of the King. *Answered*, That confirmation of the Abbot's proves, that the lands did not then hold of the King;

for it proceeds on the forfeiture of the Lord Crighton, the Abbot's vassal in these lands of Hailes, and the King's presentation of Touchadam to the convent, in place of the former vassal; and they can shew no connected right nor progress from Touchadam, but, on the contrary, have owned and acknowledged Lauderdale to be superior, by two sasines produced, wherein they mention a charter of these lands to them from the Duke of Lauderdale in 1667; and the Earl has an act of Parliament in 1641, rescinding the annexation made to the crown in 1633, in so far as concerns the lordship of Musselburgh, whereof Hailes is a part; and by the act 53. 1661, Lauderdale's right is expressly reserved in the body of the law of annexation; and by another act it is declared his right to Musselburgh shall not fall under the act *salvo jure*; *et esto* this were a private act, yet Dury observes, 10th Dec. 1622, Rothes *contra* Gordon, (*See* APPENDIX.) that the Lords would not sustain themselves competent Judges to these private acts, notwithstanding the act *salvo jure*; and though they were interpreters of the acts of Parliament, yet if they were plain and clear, none could judge on them but the Parliament itself. *Replied*, It was not enough to have declared it should be excepted from the act *salvo jure*, unless it had been actually so done; but there it is omitted, though it has been done in other cases, as particularly, in the act *salvo jure* at the end of the Parliament 1663, the ratification of the Duke and Ducthess of Buceleugh's contract of marriage is expressly inserted in the said act, and excepted from it; and it were a grievous hardship on the lieges to be concluded by such private acts of Parliament, against which they were never heard, nor to which they were not called; and the act *salvo* was contrived and introduced as an excellent remedy to preserve private parties rights, against the surprises and advantages which might be taken by great men and others in favour against their inferiors. THE LORDS, seeing no connected progress from Touchadam, who once held of the crown, and that Redhall's goodsire had taken a charter from the late Duke of Lauderdale; therefore they declared the lands held of Lauderdale; but in regard the rent was libelled at random, and the decreet taken out for all, and the time when the non-entry commenced was not proven, therefore they allowed Redhall to be heard thereupon; and in regard the case of the superiority was hitherto dubious, and that he had some probable ground to think the lands held of the King, therefore the Ordinary was to hear them from what time the full mails and duties should be here due; for though in ordinary cases they are declared from the time of citation in the process of non-entry, as that which puts the vassal *in mala fide*, at least interrups his *bona fides*, yet in some cases, where the vassal had a probable ignorance who was the true superior, the Lords have been in use to make the full rents only due from the interlocutor or decreet finding him liable, and repelling his defences; as they lately found in the non-entry pursued by Duke Hamilton against Ellies, No 14. p. 9293, where the Lords restricted the full mails and duties only to commence from the date of the decreet;

No 39.

No 39. and so the running of the non-entry farther may be easily stopt by offering to enter and requiring a charter.

1706. *January* 22.—In the declarator pursued by the Earl of Lauderdale, and Mr Alexander Maitland his brother, against Brand of Redhall, mentioned 14th February 1705, the Lords having found the lands of Hailes did hold of the Earl, and were in non-entry, but reserved to their consideration from what time the full mails and duties should be due; which point being advised this day, it was *alleged* for Redhall, That the non-entry could not begin till the Earl had declared his right of superiority, which was never found till the interlocutor in February last, seeing they stood infeft under the Great Seal holden of the King; and though the Lords had found that infeftment wrong, yet it was sufficient to put the vassal *in bona fide* till it was so found. *Answered*, The rule in non-entries was the citation, to which he restricted it; and after which he could pretend no ignorance, especially seeing he produced sasines following on precepts of *clare constat*, from the Earl of Lauderdale's predecessors to his authors, and offered to prove the lands were full. *Replied*, That decreet was intrinsically null for lack of probation; for though it was libelled that the last vassal infeft died in 1670, and that the rental of the lands was 4000 merks yearly, yet neither of these two points were proven; and it is an odious casualty, and the Lords have always taken all opportunities to restrict it; and, as Craig says, *rapienda est occasio* to pull it up by the roots; and any probable ground of doubting has moved the Lords to sustain it only for the retoured duties, even after citation; as in the Marquis of Douglas's case, against Samuel Douglas, and betwixt Queensberry, and Vassals, (*See* No 24. p. 9306.) where they were only found liable in the full rents after interlocutor, as Stair observes, lib. 2. tit. 4. There were none of the Lords moved for sustaining this non-entry from the date of the citation, which was in 1699; but some inclined that it should have the effect to produce the full mails and duties from the decreet, which was in 1700, as having put the vassal *in mala fide*; but the plurality considered, that none of the cases wherein the Lords had formerly taken latitude to restrict this casualty, had so much probable colour to excuse as this; and therefore restricted the non-entry to the last interlocutor in February 1705, finding the Earl to be superior; and I observe the Lords have taken that same method in explaining that rule of law, *bonæ fidei possessor facit fructus consumptos suos*, and that *mala fides*, once instructed, obliges to restore all the bygone fruits and profits; for where the title is debateable, the Lords have fallen on sundry periods; if there was no pretence, they have drawn back the restitution to the time of the citation; but if there was a probable ground of doubting, they have sometimes fixed on the act of litiscontentation to induce this *mala fides*, and to interrupt the lucrating the intermediate fruits; and at other times they have not sustained it till after sentence, of which we have several instances given by Stair, lib.

2. tit. 1. which shews it is nothing but what the Lords these 100 years have been in the constant practice of, according to the circumstances before them. No 39.

Fol. Dic. v. 2. p. 7. Fountainhall, v. 2. p. 211. 268. and 314.

*** Forbes reports this case:

IN the discussing of a suspension of a decreet of declarator of non-entry of the lands of Easter and Wester Hailes, obtained by the Earl of Lauderdale against Alexander Brand of Castle Brand, in *anno* 1700, and assigned by the Earl to his brother, Mr Alexander Maitland; this decreet was suspended, and the LORDS, February 14th 1705, having found that the lands held of the Earl, and were in non-entry; they found this day the full duties only due from the said interlocutor 1705; because the vassal had reason to doubt if the Earl was true superior, having produced a progress holding of the Crown since the Reformation; and the Earl having a certification in an improbation against any rights granted by his, to the defender's predecessors. For, Nemo tenetur propter metum hujus periculi temere jus suum indefensum relinquere, l. 40. in fin. pr. D. De Hæred. Petit.

Forbes, p. 76.

1716. *November* 22.

The HEIRS of NEWTON JOHNSTON *against* JOHNSTON of Corehead.

THE estate of Newton being under sequestration, and Newton himself bankrupt, a declarator of non-entry is pursued by Johnston of Corehead the superior, whose grandfather 66 years ago obtained charter and precept of sasine under the Great Seal, upon the resignation of the then proprietor; but no infeftment followed thereon till the year 1714, when the present Corehead was infeft in the terms of the act of Parliament 1693, allowing such infeftments, even *mortuo mandante*; no compearance being made for the common debtor, the real creditors, though not called, compeared; and the LORDS, after hearing parties, having inclined last July to decern for the full rents from the time of the citation; and having repelled all their objections against the superior's title, they now, in a reclaiming petition, *allege*, That the non-entry ought to be restricted to the retoured duties to the date of the Lords' last interlocutor, sustaining the pursuer's title, and this because processes of non-entry for the full duties are penal and unfavourable; therefore, where there is but any doubtfulness in the pursuer's title, the Lords use to restrict the effect of the declarator to the retoured duties till the title be sustained; and that there was great ground to doubt in the present case, appeared, 1*mo*, That in this process neither the real creditors nor factor were called; 2*do*, The right itself (though now sustained

No 40.
Found in conformity with Earl of Lauderdale against Brand, *supra*.