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.

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

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.

by the Lords,) was very doubtful whether valid or not, it being apparently prescrived, since no infeftment was taken, and is 66 years after its date; *3tio*, The act 1693 seems only to relate to precepts granted by subjects; but the King cannot die.

Answered for the pursuer; That it is a known principle, that the full duties are due from the citation in the declarator; nor is this odious, since it is inherent in the nature of all fees; and this the LORDS found, Harper against his Vassals, No 23. p. 9305.; and Faa against the Lord Balmerino and Powrie, No 25. p. 9307.; nay, this the LORDS found in the case of the Earl of Argyle against M'Leod, though there the non-entry arose from the reduction of a retour, and so the defender had much stronger pretensions to a *bona fides* till the sentence in the reduction, than here the defenders can pretend to; *2do*, Since here the common debtor's representative makes no objections against the pursuer's title (neither can he without disclamation,) so the creditors can make none, except in the right of the said apparent heir; and consequently it was in vain for them, whom the superior is not bound to notice, to pretend to any other ground of *bona fides* except such as would have been competent to the apparent heir himself. In short, the casualty does not arise from theirs, but the heir's non-entry; and therefore no *bona fides* can defend against it, but his alone by whom it falls; and therefore, *3tio* Since Newton could not mistake his superior, or be *in bona fide* to quarrel his right, neither can the creditors; besides, that the creditors being real by infeftment, How could they be so without knowing the condition of their author's right, (who infeft them,) and consequently who was his superior? since unusquisque scire debet conditionem ejus cum-quo contrahit. And as to precedents and the Lords' practice, the pretence to *bona fides* and dubiety was sustained only in case of a singular successor to the superiority, but never where there was no change of the superior; *4tio*, It is scarce possible to find out habile circumstances for finding such a pretext.

"THE LORDS found the creditors liable for the full rents from the time that their objections against the pursuer's title were repelled."

Act. *Ro. Dundas.* Alt. *Ila.* Clerk, *M'Kenzie.*

Fol. Dic. v. 2. *p.* 7. *Bruce, v.* 2. *No* 36. *p.* 46.

*** A similar decision was pronounced 24th June 1715, Governors of Heriot's Hospital against Hepburn, No 54. p. 7986., *voce* KIRK PATRIMONY.

No 41.
A person having made up singular titles to his prede-

1745. *June* 29. CAPTAIN CHALMER *against* His VASSALS.

CAPTAIN CHALMER of Gadgirth pursued his vassals for non-entry duties, who *answered*, They could only be liable from the time he was infeft himself, because the affairs of the family of Gadgirth had been in such confusion, and the