No 27.
for non-entry but the feu-mail.

lands during the time of the non-entries, it was *excepted*, That the feu-lands came not in non-entries; and giving that they came in non-entries, no farther profit should pertain to the superior but the feu-mails. It was *decerned*, That feu-lands were in non-entries, so long as no sasine was taken of the same, and no farther profit to pertain to the superior than the feu-mails, which the superior might poind for by reason of non-entries; but in case the lands be full, he may not poind, but call and pursue.

Fol. Dic. v. 2. p. 6. Maitland, MS. p. 221.

1591. *June.* MASTER of LINDSAY *against* HAMILTONS.

No 28.
Found as above.

THE Master of Lindsay and David Dundas of Priestinch, as having the gift of non-entries of the lands of Bruis and Crossflat, and certain other lands within the barony of Abercrombie, warned James Hamilton of Livingston, and Patrick Hamilton, his son, and Mathew Hamilton of P., to flit and remove from the said lands. It was *excepted* by the said James and Patrick Hamiltons, That they ought not to remove, because the title used by the pursuer was a decree of non-entries, which was taken away, in so far as there was a decree-arbitral upon a submission, whereby the Master and David Dundas had renounced all right and title that they had by virtue of the said decree. It was *replied*, That they could not be heard to propone the renunciation made by virtue of the said decree; because of before there was a process of comprising deduced, whereby, by virtue of the said decree, the whole lands which the defenders were warned to remove from were decerned to be comprised for the by-run duties; and the said defenders compeared in the said process, and made defence, and proponed not this defence of the renunciation of the decree, which would have been very competent to them to have elided and stopped the comprising; and having *dolose* omitted the same, could not be heard as to another judgment to propone the same. It was *answered*, That the defence, proponed now of the renunciation of the decree-arbitral, was most competent in this time, after the intenting of the warning, and to take away the decree arbitral, whereby the warning was made, which was not by reason of the comprising, but by virtue of the decree of non-entries. It was *answered*, That this allegeance would ay have slain the comprising, and the decree whereupon the comprising followed, and so behoved to be ay *dolose* omitted, and could not now be proponed *quia leges nunquam patrocinantur dolo et fraudi.* THE LORDS repelled the exception, in respect of the reply, and found that because this allegeance was not proponed the time of the comprising, it behoved necessarily to be *dolose* omitted. *Advocatus et pauci alii fuerunt in contraria opinione.*

Into the same action and cause it was *excepted* for Mathew Hamilton and his wife, That they could not be decerned to flit and remove; because, long before the warning, they had the five oxengate of land of the lands of Philipstone,

from which they were to flit and remove, set in feu to them by James Hamilton of Livingston, for yearly payment of ; and because it was provided by act of Parliament, that it shall be leisome to all men, as well of kirk-lands as of temporal, to set the same in feu-farm, notwithstanding that the Lord's immediate vassal held the same by ward and relief, there could no farther be decerned of the said lands to fall in non-entries but the retoured mails, or the feu-duties. To this was *answered*, That the immediate superior being decerned to come in non-entries, the lands that he held behoved to come also; and albeit that before the decree there could be no farther sought but the feu or retoured mails, yet, after the decree, all the hail profits of the lands behoved to come in non-entries. THE LORDS, *una voce dissentiente, quod rarum est*, found, That the lands that were holden in feu could not come in non-entries, by reason of the ward, and that there could be no farther sought of them but the feu-duties *quia feodum et hoc genus feodi quod proprie emphiteusis dicitur est perpetuo locatum et quamvis utile dominium transfertur in emphiteuticarium, tamen proprietas remanet penes concedentem*; and so the lands could never be comprised by reason of non-entries, because the property remained still with the setter, and there could be no farther sought but the yearly duty of the infeftment.

Fol. Dic. v. 2. *p.* 6. *Colvil, MS. p.* 468.

No 28.

1631. *February* 3. OGRIE *against* MURRAY.

No 29.
In a blench, holding the superior before declarator of non-entry, can claim no more than the retoured blench duties.

THOMAS OGRIE, as heir to his good-sir, being infeft in *anno* 1630, in the lands of Stobo, pursues David Murray of Hallmyre, superior of the said lands, and who had intromitted with the duties thereof, for payment of the same to him for diverse years before his sasine, and since the decease of his good-sir; and the defender *alleging*, That the lands being in his hands as superior, in non-entry for these years before the pursuer's sasine, he had right thereby to the said duties; and the pursuer *answering*, That the non-entry was not declared; 2*do*, That he held the lands blench, so that the superior could have no other duty by non-entry before declarator, but the retour blench-duty; and the excipient *duplying*, That he being singular successor to the author, of this pursuer's good-sir's right, and, by virtue of his right, in possession of the lands, and neither the pursuer nor his good-sir in possession ever of the land, his possession must be as sufficient to him as a declarator;——THE LORDS found, That this non-entry in blench lands was not sufficient to exclude this pursuit, seeing the superior by the non-entry could claim no more but the retoured blench duties; for this is not alike, as in an annualrent, which the heritor of the land, out of the which it is payable, may bruik ay and while the entry of the annualrenter;