

* * * Durie reports this case :

No 12.

1628. *November 28.*—IN this action a Magistrate being pursued for the debt, for not taking the rebel, he being charged for that effect, and he *alleging*, that the horning should be produced, which was the ground of the charge of caption, and which he alleged was null; the LORDS found no necessity to produce the horning against the rebel, in this judgment and action against the Magistrate; but the defender might produce the horning himself; as also such actions needed not to abide continuation, where the summons has a privilege.

Act. *McGill.*

Alt. *Gibson.*

Clerk, *Scot.*

1628. *December 4.*—IN the cause, Potter against Baillie, mentioned 28th November, the LORDS found, that Magistrates, in such actions as these, when they are moved against them for payment of the debt, for disobeying of charges of caption, might propone nullity of the horning against the rebel, which was the ground of these charges of caption, and that they might deny to obey such charges upon their own hazard; for if the horning be null, the LORDS found, that the not satisfying of the command of the caption could not produce that action; and found that the defender himself might produce the horning, and oppone against the lawfulness thereof, albeit the pursuer should be urged to the production thereof, and this horning was found null, because the execution of the charge bore, 'that the party was charged at his dwelling-place in Inverness, and he was denounced at Aberdeen;' so that either the charge or denunciation was not good, and so the horning fell; neither was it respected, that the charge was intimated personally to the party apprehended after the charge, seeing the intimation was not a charge, for it bore not a copy to be delivered; and there was no probation received anent the parties' dwelling at the time of the charge or denunciation, but in respect the horning bore, as is above written, it was found null in itself.

Durie, p. 401. & 404.

1629. *June 24.*

Sir MUNGO MURRAY against ———.

No 13.

IN a general declarator of non-entry of the lands and Earldom of Athole, pursued by Sir Mungo Murray, it was *alleged, imò*, for my Lord St Colme's son, There could be no declarator of non-entry by the decease of Scott of Abbotshall, because there was none called to represent him. *Replied*, The excipient had no interest to propone that, unless he show and instruct some right and title in his person flowing from Abbotshall. *Duplied*, It was competent to any defender that was called, to propone any defence in general against the summons. " THE LORDS found this exception relevant, and competent to any

In a declarator of non-entry at the instance of the King's donatar against sub-vassals upon the vassal's lying out unentered, the Lords sustained this

No 13.
 exception,
 that by a con-
 dition of the
 vassal's in-
 feftment, the
 lands, in de-
 fault of heirs-
 male, were to
 return to the
 Crown ;
 which condi-
 tion being
 purified, the
 lands are in
 his Majesty's
 person, and
 consequently
 are full, as the
 King needs
 not be infeft.

of the defenders." *2do, Alleged*, All parties having interest are not summon-
 ed, viz. the Laird of Inchmartin, who is heritably infeft in certain of the lands
 whereof the non-entry was sought, and for verifying thereof produced his sa-
 sine. *Replied*, The dilator was not verified by the sasine produced, which is
 only the assertion of a notary, and could not prove Inchmartin to be the King's
 immediate vassal, unless the charter were likewise produced. *Duplied*, The
 sasine being granted upon precepts direct forth of the Chancery, is sufficient to
 instruct the dilator. THE LORDS found this exception relevant, and that it be-
 ing only a dilator, the sasine was sufficient to instruct it, which would not have
 been thought if it had been a peremptory exception. *3tio, Alleged* to the last
 dilator, No necessity of citing Inchmartin, because the pursuer declares, he
 craves no non-entry by decease of Inchmartin, or any of his predecessors or
 authors, but only by the decease of the persons contained in his summons, from
 whom Inchmartin has no right, and therefore needed not to be summoned to
 this declarator. *Answered*, The declarator is not sufficient, unless it were de-
 clared, that nothing to follow upon this declarator shall prejudge Inchmartin
 in his right of the lands contained in his infeftment. *Duplied*, Seeing he de-
 clares that he craves no non-entry by Inchmartin's author's or predecessor's de-
 cease, that declarator removes the necessity of citation. THE LORDS repelled
 the allegiance against the citation, in respect of the declarator. *4to, Alleged*,
 No declarator of non-entry by the decease of Balwery, as he who died last vest
 and seised in the lands of Athole, because there is action of reduction at the
 instance of Inchmartin, intented and depending, for reducing Balwery's infeft-
 ment, wherein if he prevail, that infeftment can be no ground to produce this
 declarator, and so that action of reduction is prejudicial, and should be first dis-
 cussed. *Replied*, Not prejudicial, because *dubius est eventus litis*, and if Bal-
 wery's infeftment be reduced, then this declarator, and all that depends there-
 upon, will fall in consequence, in so far as it depends upon the decease of Bal-
 wery, so that Inchmartin is not prejudged by this action, which has dependence
 upon other grounds, and cannot be stopped upon the dependence of that action
 of reduction. THE LORDS repelled this allegiance. *5to, Alleged* for Inchmartin,
 who produced his interest, No declarator of non-entry of the lands of Downie,
 &c. because the said lands are full by infeftments thereof standing in the ex-
 cipient's persons and his predecessors for the space of thirty or forty years, so
 that the lands being full holding of the King, there could be no gift of non-
 entry granted by the King ; at least, if there be any non-entry intervening be-
 tween the excipient and his author's infeftment, that non-entry is declared, and
 the right thereof established in the person of Inchmartin, and so no declarator.
Replied, The exception meets not the summons, wherein he craves only non-
 entry by the decease of the particular persons therein contained, which cannot
 be stopped by any infeftment standing in the person of Inchmartin ; neither
 can this declarator of non-entry vacant by other mens decease, prejudge Inch-
 martin's infeftment ; and therefore, unless it were alleged that the lands were

full by infeftments of the persons libelled and their heirs, the exception should be repelled as not competent against the summons. *Duplied*, By the practique it is a good exception and sufficient to exclude non-entry, that the lands have been full for the space of forty years in whatsoever man's person. *Triplid*, Albeit the exception be relevant in persons of one descent and lineal succession; to allege the lands full forty years by infeftments of persons of the same race and descent, yet the same cannot be respected in this case, because it meets not the summons, wherein non-entry is craved by the decease of several persons from whom Inchmartin is not descended. THE LORDS repelled this exception, unless the excipient would allege his infeftment to have been clothed with possession, at least some years immediately preceding the intending of this action. *6to*, *Alleged*, No non-entry by decease of John Earl of Athole; because, by the condition of his infeftment, the lands returned to the King in case of failzie of heirs-male, which falling out by his decease, the lands *eo ipso* returned to the King without any other infeftment than he had *jure coronæ*; so that the lands being full in the King's person, there can be no non-entry by John's decease. *Replied*, *1st*, Not competent to be proponed by any, but them who derive right from the said John or the King, as was decided between Francis Douglas and the Laird of Lee, (*See APPENDIX.*) *Next*, Not relevant to allege that the condition of the infeftment provided the lands to return to the King, unless it were positively alleged that the King has acknowledged the lands to have returned to him, either by apprehending possession thereof, or by disponing the same to some party; for, by the contrary, the King has disavowed the return thereof to the Crown by virtue of that provision, in so far as he has disponed the non-entry thereof by the decease of the said John. *Duplied*, *1st*, Competent to be proponed by any defender to exclude the pursuer, although they have no right flowing from the King or the said John. *Next*, Relevant, for it is sufficient to purge the non-entry, to allege that the lands are returned to the King, *qui adit hæreditatem jure coronæ*, and needs no infeftment nor acknowledgement of the return, and the gifting of the non-entry cannot take away that title which is inherent in the Crown by the provision of the infeftment, and is as sufficient to purge this non-entry as if he were infeft. THE LORDS found the allegiance both competent to the defender, and relevant. *7tmo*, *Alleged* for the Vassals of the Earldom, No declarator in favours of the pursuer, because his name is borrowed for the behoof of John now Earl of Athole, who is son and apparent heir to the umquhile Earl of Tullibardin superior to them, and ought to enter heir to him, and therefore cannot crave a benefit through his own fault to the defender's prejudice, viz. to have the non-entry, which he procureth through his own lying out. *Replied*, The apparent heir may as well take the gift of non-entry as a stranger, and if the defender be prejudged thereby, he has a remedy of law to charge the apparent heir to enter, which if he refuse to do he may enter by the King, so that they cannot be prejudged. THE LORDS repelled this allegiance, June 25. 1629. *8vo*, *Alleged* for Duncan Wemyss, No decla-

- No 13. rator of his lands, because he is infeft therein by the King with a gift *de novo damus*, including all non-entries, &c. and must stop his declarator, especially seeing he offers to prove, thar, since the date of his infeftment, he has been in continual possession thereof. *Replied*, Not relevant to purge any non-entry posterior to the said gift *de novo damus*, though it will take away all before, for the King could give no more than was vacant in his own hand the time of the said gift, and therefore he may gift any posterior non-entry, falling by the decease of any vassal after the infeftment, and the same gift ought to be declared. THE LORDS found this exception relevant. After this the pursuer *protested*, That in respect that his declarator of these last lands is stopped by proponing of this allegiance, he might have the benefit to reduce the rights whereupon this allegiance is founded, and to pursue for the mails and duties of the lands, and to make warning, sicklike as if his gift had been declared. Which protestation the LORDS admitted. See NON-ENTRY.

Fol. Dic. v. 1. p. 517. Spottiswood, (NON-ENTRY.) p. 222.

1629. July 27.

LADY CATHCART *against* LAIRD OF CROSSCRAWFORD.

No 14.

IF a Lady be infeft in the annualrent of ward-lands and her infeftment confirmed by the superior, after the decease of her spouse, if she shall take a gift of the ward-land and misken her own infeftment, by virtue of her gift pursue removing of her husband's vassals during the time of the ward; the LORDS will find she can not quarrel her vassal's rights of the said lands, or any part of them, wherein she stood infeft and confirmed by the superior.

Fol. Dic. v. 1. p. 516. Auchinleck, MS. p. 247.

1630. July 14. HAY *against* The EARL of MARISHALL.

No 15.

A MAGISTRATE being charged (even by the first charge) to apprehend a rebel, if he after that have communication with him at any time within year and day, after the charge, and do not apprehend him, he will be liable for the debt owing by the rebel. But attour year and day this will not be sustained upon an old charge.

Fol. Dic. v. 1. p. 516. Spottiswood, (CAPTION.) p. 32.

* * Durie reports this case :

THE Earl of Marshall, as Sheriff of the Mearns, being pursued by a creditor to pay the debt for not taking of the rebel, he being charged to take him.