

No 46.

1593. March 4. EARL OF CRAWFORD *against* BALMUBY.

IN the action of non-entry pursued by the Earl of Crawford against the Laird of Balmuby, the LORDS found, that an exception, that filling of lands by the space of 36 years, elides the said pursuit;—and the LORDS decerned that they would observe that as a practice in all actions of non-entries; and that it is sufficient to allege, that the lands have been full by the space of 36 years immediately preceding the time of litiscontestation in the said pursuit of non-entries.

Fol. Dic. v. 2. p. 7. Haddington, MS. No 384.

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1613. June 14. ARTHUR *against* LAIRD OF BLEKO.

IN an action betwixt Mr John Arthur and the Laird of Bleko, the LORDS sustained a sasine upon a retour granted by the heir of the old superior, who was denuded, to purge the non-entry, notwithstanding it was offered to be proved, that long before the space of four ages the superior was denuded.

Item, it was found in that case, that the lands being full 40 years by a sasine, it purged all the preceding non-entry.

Fol. Dic. v. 2. p. 7. Kerse, MS. fol. 117.

No 48.

1629. March 19.

DOUGLAS and E. ANGUS *against* E. LAUDERDALE, and L. LEY.

Though it is a good defence against all preceding non-entries, that the lands have been full for the space of 40 years, yet this was repelled as *jus tertii*, when proponed by a party who had no right to the infestment, by which the lands were alleged to be full.

A DECLARATOR of non-entry of lands being sought, and one of the defenders compearing, and alleging that Lauderdale was infest in these lands, and that he and his author immediately before him were infest therein, by rights and infestments these 40 years by-past, whereby the land was full that space, and which by the practise of the kingdom purged all non-entry; this exception was repelled, being proponed by the defender, who alleged no right to the lands flowing from the Earl of Lauderdale, by whose right the lands were alleged to be full; and so it was *jus tertii*, and not competent to the proponer; whereas if he either had right from the Lo. Lauderdale, or that the Lo. Lauderdale's self had proponed it, the same would have been found relevant; for a defender, excepting upon his own right, or his author's, that the lands was full in their person by the space of 40 years, it is enough to purge all preceding non-entry; but the Lo. Lauderdale not being compearing (being a party called) to propone this, as said is, it was repelled *ut supra*, as not competent to the proponer; for in effect the non-entry was pursued to the behoof of the Lo. Lauderdale, to

eschew a pursuit of redaction intended against his right to these lands, by the same party proponer of this exception, which was intended by him, as heir to that person, by whose decease the non-entry now acclaimed was ever sought *sinsyne*; neither was it respected, where it was alleged that the lands being full, *eo casu* there could not be a non-entry; far less where their two rights are contrary and unaccountable; and so they might be proponed by any party called, being a defence which extinguisheth that right *in toto*; and if that right whereby the lands were full, were called in question, the non-entry ought to sleep while the event of that process; for if the party infest prevailed, he was in surety, and there needed no other right of non-entry to secure the same; and if it should be elided by any better right, then the non-entry might be sought; but so long as that right stood, all non-entry was thereby excluded, which was repelled *ut supra*.

Act. *Stuart et Aiton.*

Alt. *Nicolson et Morwat.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 7. Durie, p. 439.

* * * Spottiswood reports this case:

1629. *March 20.*—FRANCIS DOUGLAS brother to the Earl of Angus having obtained a gift of non-entry of the barony of Braidwood, by the death of David Stuart of Craigiehall pursued general declarator of the said non-entry. *Alleged* for the Laird of Lee, assignee constituted by James Stuart to his right of the said lands, that the non-entry could not be declared, because the said lands were full, in so far as my Lord Lauderdale, and his father before him, stand infest in the said barony holding of the King these 40, or at least 30 years bygone. *Replied*, The excipient had no interest to propone that allegiance, being *jus tertii*; likeas his cedent obtained himself served heir to the said unquhile David, alleging him to have died last vest and seised in these lands, whereby he acknowledged the lands to be in non-entry since David's decease, and so cannot propone an allegiance upon the Earl of Lauderdale's infestment. THE LORDS repelled the exception as not competent to the defender.

Spottiswood, (NON-ENTRY) p. 221.

* * * This case is also reported by Auchinleck:

1629. *March 19.*—A PARTY served general heir to one of his predecessors, is pursued by a donatar to hear and see the lands whereunto he is declared heir to be in non-entry since the decease of his predecessor, to whom he is served general heir. He *alleged*, That the lands are not to be decerned to be in non-entry, because they are full by another person who stands infest, and he and his predecessors have stood infest by the space of 40 years. It is *answered*, ought to be repelled in respect the present infestment alleged is *jus tertii*, and

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cannot purge the non-entry of the lands, whereunto he is apparent heir; since the decease of his predecessors, by whose right he intends to reduce the said infestment, whereby he alleges the lands to be full. The LORDS repelled the allegiance, as not competent to the defender to propone to defend upon another man's right.

The like was decided by interlocutor in the declarator pursued by Sir Mungo Murray, master of Stormont, donatar to the non-entry of Athole, against the pretended Heritor of Athol, 25th June 1629, *infra*.

Auchinleck, MS. p. 138.

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An infestment standing for 40 years, clad with possession for several years past, was found sufficient to exclude declarator of non-entry, though it was sought with respect to another vassal with whom the possessor did not connect.

An infestment granted by the King with *novodamus*, and clad with 15 years possession, was found sufficient to defend against a declarator of non-entry, whether prior or subsequent to said infestment, though pursued on the non-entry of a different vassal, whose right to the lands was preferable to that of the excipient's author, without prejudice to the pursuer to insist in a reduction of the excipient's right, or in mails and duties.

1629. June 25.

MURRAY against L. INCHMARTINE.

IN an action of non-entry of the earldom of Athol, an infestment of the lands standing by the space of 40 years, and clad with present possession, and diverse years preceding, was found sufficient to purge all non-entry, albeit the non-entry was not sought for the fault of non-entring of any of the predecessors of those, whose rights were alleged to make the lands full, but was sought upon another ground, to wit, for the non-entry of an heir to another vassal who died infest in the lands, and from the which vassal the excipient's rights flowed not, but were distinct rights flowing from several authors and different persons; likeas it was declared, that the non-entry was not sought, but so far as concerned that right to the lands, which subsisted in the person of him, by whose decease it was gifted, and whereby he craved the same, which had no contingency with that right, whereby the lands were alleged to be full, and when special declarator should be sought, then that right would be entire, and might be used; notwithstanding whereof the said allegiance of the lands being full 40 years together, and possession had conform thereto, was sustained to purge whatsoever non-entry, albeit craved from another cause, so long as these infestments, whereby the lands were full, stood in their own strength unreduced; but the exception was repelled, and found not relevant, seeing the defender could not allege that these infestments were clad with possession, without which possession conform to the right, the same was not found to purge the non-entry, and to make the lands full, against the non-entry falling by the decease of a vassal, who by virtue of his right was in continual possession, and who the time of his decease was vassal, and an actual possessor, whereby the donatar to the non-entry claimed to be in the place of the vassal possessing; and it being also *alleged*, That the non-entry could not be sought by decease of that vassal, by whose decease it was craved, seeing in the principal right made to his predecessors of the lands libelled, it was provided, that failzing of heirs-male to be gotten of the receiver of the infestment his body, the lands should pertain to the King, and the last deceasing having no heirs-male, the King came in the right thereof, who by reason of his Crown, needed not, nor cannot be seised, and which as a sasine