merks, in liferent; and, though the style of the adjudication bore the whole sum to them in liferent, yet that behoved to be understood *in sano sensu, et singula singulis;* seeing *non agebatur,* by adjudging, to augment or increase her jointure, but only to secure the money on the debtor's estate from perishing.

ANSWERED,—The very nature of the right bore her plainly to the liferent of the whole; and it was equivalent to an assignation from the husband, and needed no farther declaration of his intention.

The Lords found it could not be the husband's meaning to give her any more liferent, but precisely of the primary sum of 1400 merks, and not of the subsequent annualrents accumulated in the adjudication. *Vol. I. Page* 658.

---

1695. *January* 16. ANNE CARNEGIE *against* JOHN RAMSAY, Merchant in Perth.

THE Lords had found, that, by the conception of the testament, she had right to her 600 merks of jointure, and to her 3000 merks of tocher. But, since that time, a codicil, subsequent to the testament, being produced, it was contended he had thereby altered the same, and restricted her, in case of her daughter's decease, to the 3000 merks; because, in that event, it bore she should fall from her jointure. But the words, "from her," being in the margin, and unsubscribed, the Lords rejected this codicil, and adhered to their first interlocutor. *Vol. I. Page* 659.

---

1687, 1693, *and* 1695. The DUKE of HAMILTON *against* MR JOHN ELIES of ELIESTON.

[See the previous parts of the Report of this Case, Dictionary, p. 9293.]

1687. *July* 28 *and* 29.—The Duke of Hamilton against Mr John Elies of Elieston and Sir James Hamilton of Maner-Elieston. This is a reduction which they had raised of the Duke's declarator of non-entry, mentioned 12th March 1684. And they craved to be reponed against that decreet, as pronounced in vacance by three Lords, having a delegation from the rest, without reporting to the whole body. ANSWERED,—The decreet was pronounced in session, and the seeing it extracted was only remitted to these three Lords, who ordered it in vacance.

*2do.* That the Duke's letter was not considered. The Duke opponed the decreet.

For Squire Hamilton, it was ALLEGED, The decreet was in absence *quoad* him; for, though there was a bill given in in his name, that was only done by Mr John Elies, and he denied that he was present at Robert Hamilton's deponing. And the execution against him, (being then in Ireland,) does not bear that a copy was left at the market-cross of Edinburgh, and it was not stamped, and so was null. And if he, as apparent heir, was not called, then the whole decreet fell; as was found in the Duke's case with the Lady Callander, 16th July current.

The President ANSWERED,—These were good objections and nullities against a horning, but not against a citation on a summons.

Then farther ALLEGED, That the decreet was null, because it was not proven when the Squire's father, Sir William Hamilton, died, by whose death the non-entry began. ANSWERED,—It needed not, the heir's being unentered being a negative, proving itself; and it was not denied.

Thir being ALLEGED to turn the decreet into a libel, it was then farther contended, That non-entry is odious, *et quævis probabilis causa excusat.* And so, on the *26th of November* 1672, in the case of the *Earl of Argyle* against *M'Leod,* observed by Stair, the Lords had found, the full maills and duties were only due from the date of reducing M'Leod's retour and seasine, which, as long as it stood, excluded non-entry: and *ibid,* on the *8th of December* 1671, between *Black* and *Elies,* the Lords found Elieston's infeftment from the usurpers sufficient to exclude non-entry. And the 12th Act of Parliament, 1661, anent judicial procedure in the English time, excepts the rights of private parties. *2do.* Elieston was infeft by the Duke himself; and, though the charter (the warrant of it) was cancelled, yet the Duke's letter allowed him to take seasine; and Robert Hamilton's oath could not take his infeftment from him, being but *testis singularis,* and not remembering the conditions of the deposition, but only *ex auditu,* that the Duke said to him they were not fulfilled.

ANSWERED,—Non-entry is much more easy and favourable in our law, than by the feudal customs, where, after year and day, the whole rent was due to the superior on this fictitious contumacy, though he should never interpel nor require the vassal to enter: but, with us, he has nothing but the retoured duty, till he interpel by a citation on a general declarator, That Elieston was a lawyer, and knew his hazard, and could not pretend *bona fides,* producing the cancelled charter himself, as being in his own hand.

The Chancellor desired to be declined in this cause, as Duke Hamilton's brother-in-law, though he favoured Sir James, as a papist; but the Lords laid over the advising it till November, to the Duke's great dissatisfaction; and recommended to the President to try to agree them in the mean time.

*Vol. I. Page* 471.

1693. *December* 20.—The Duke and Duchess of Hamilton against Mr John Elies of Elieston. The Lords found the intimation, made at the Abbey to the Duchess, was sufficient, seeing she was a pursuer, and that the act of sederunt 1682, anent intimating bills of suspension sought on juratory caution, and consigning a disposition of their estate, does not mention the case of a charger's being out of the country; for, if the intimation were to be made to them on sixty days, then the charge against him (being on six or fifteen days,) would elapse long before. And, as to the tenants disclaiming the bill given in in their name, the Lords found, a master or creditor might make use of their debtor or tenant's name; and that the bill ought to proceed, whether they disowned it or not. As to the third, about the year's rent for an entry, and the Duke's bygone intromissions with the rents of Shiells, Greenleyes, &c. the Lords ordained the full year's rent, and bygone non-entry duties, to be consigned in the clerk's hands; deducing the three years' intromission which the Duchess had with the rents, till they be liquidated, either by the Duke's oath, or by the decreet of maills and duties obtained by Elieston against these tenants; whereupon the Duke founded to instruct the yearly rent: and, as to what he did not consign,

ordained him, on the passing of this bill of suspension, to find caution; though it was alleged by some, that this was to put the Duke of Hamilton out of possession. *Vol. I. Page* 581.

1695. *January* 16.—Arbruchel reported Ellieses and their husbands against James Hamilton of Aikenhead and the Duchess of Hamilton, who had a decreet of declarator for the maills and duties of thir lands, holden of the Duchess, and whereof the rests were assigned to the deceased Mr John Ellies, and now fell to his daughters.

The Lords found the assignation, being posterior to the citation of non-entry, whereon a decreet followed for thir very rents, the superior was preferable to such an assignee or singular successor. But, in regard the same was not all uplifted out of the lands holden of the Duchess; therefore, the Lords ordained them to be proportioned accordingly as they were actually uplifted; and, if that cannot appear, then conform to the value of their respective lands. The Lords confessed this preference of the superior was *durum; sed ita lex scripta est*, till these feudal delinquencies be rectified. *Vol. I. Page* 659.

---

1695. *January* 17. Mr John Sinclair of Balgreigie *against* Douglas of Strendry and Others.

This was a declarator of his right of servitude in a great adjacent commonty. The Lords found, the adjacent heritors, who had right there and possession, might debar him, unless he showed a constitution, either by forty years' possession, without interruption, or that Balmuto, who entered into that contract in 1588, was his author in these lands, and was then heritor undenuded, and that he derives right from him by progress; for the Lords did not think the presumption of his being then so designed, sufficient to prove he was heritor, unless it were otherwise instructed. And, though some argued, that contiguity to a muir, with the clause *cum communi pastura*, gave a sufficient right, the Lords thought this not effectual to begin a prescription as a title; but would not give it without possession. *Vol. I. Page* 660.

---

1695. *January* 17. Mr John Sinclair of Balgreigie *against* Inglis of Easterbowhill.

Arniston reported Mr John Sinclair of Balgreigie against Inglis of Easterbowhill, for declarator of his property of a piece of land called the Strudders. The defence was, Prescription, by forty years' possession.

Answered,—Interrupted by liferents, during which time they encroached.

The Lords found the liferenter's possessing by his right, he was *valens agere* to have hindered them either *via facti vel juris*; and so could make no interruption.