

No 48.

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.*

No 49.

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

must purge the non-entry; this exception was sustained to purge the non-entry, albeit the proponer deduced no right from the King in his person to the land, and albeit the pursuers *replied*, That though the King had a potential right by that provision, whereby he might claim the right to the land, yet it was in his own will to claim that right, which he claimed not, but by the contrary he had repudiated the same, by giving the non-entry to the pursuer, and never acclaiming right to the land by that provision, nor yet possession sinsyne by the space of 50 years since the vassal's decease; likeas the King's advocate assisted the non-entry, whereby he being the King's officer, having special interest, and not claiming any right for the King but the non-entry, no other could obtrude that right; notwithstanding of which answer the exception was sustained, and the reply not respected.

Act. *Advocatus, Nicolson & Aiton.*

Alt. *Stuart.*

Clerk, *Gibson.*

In this same above written cause of the non-entry of Athol, an exception was sustained to purge all non-entry for other lands, than the former lands whereof he was possessor, by whose decease the non-entry was sought, founded upon the excipient's own infeftment of the lands libelled, granted in *anno* 1614, by the King, and continual possession since the date thereof; for that infeftment and possession yet continuing, was found enough to take away all non-entry, so long as the same stood unreduced, the lands being thereby full, and the King having a vassal, which vassal was in actual possession, and which right and possession would have defended the excipient against a removing, or a pursuit for mails and duties, and far more ought to defend against the non-entry, so long as it stood; albeit the pursuer *replied*, That that infeftment could not take away the non-entry, which was gifted, and depended upon the right of another vassal than the excipient's author; and also though he *replied*, That the said vassal, by whose decease the non-entry was gifted, was infeft in the lands before the excipient's author's right; yet the exception was sustained, to purge all non entry falling by whatsoever cause, since the date thereof, so long as it stood, being clad with present, and 15 years possession preceding; and so in this case, a right with 15 years possession was sustained, to purge all subsequent non-entry, falling by the decease of any other vassal, or any cause, after the date thereof; and it was also sustained, to purge all preceding non-entry, before the date thereof, because in that infeftment, the King had disposed the lands excepted on with an express clause *de novo damus*, dispensing with all preceding non-entries and other faults, whereby all non-entry preceding the same was taken away, there being no donatar thereto before his infeftment; and this was found to take away this non-entry, gifted since the date of his infeftment; and in respect of the foresaid exception, whereby the declarator was elided as said is, the LORDS declared, that this gift and action intented, and so elided, should be as effectual to the pursuer to reduce that infeftment, whereupon the exception is founded, or otherwise to pursue removing, or for the

No 49.

mails and duties of the said lands, as if the said general declarator had taken effect; the admitting of which exception in this action, should not be derogatory to him therein, without prejudice always to this excipient, of all his defences against these pursuits, whereby he may maintain his said rights, and elide these pursuits, *prout de jure*.

*Fol. Dic. v. 2. p. 7. Durie, p. 449.*

\* \* \* Spottiswood's report of this case is No 13. p. 7789, *voce* JUS TERTII.

\* \* \* Auchinleck reports this case :

AN infestment granted by the King, of certain lands to a person who by virtue of his infestment apprehended possession, doth exclude all donatars seeking declarator of non-entry of all these lands; but notwithstanding that the donatar is debarred from a declarator, yet, by virtue of his gift, he will have action and interest to reduce the infestment clad with possession *prout de jure*.

*Auchinleck, MS. p. 139.*

Whether in an infestment *a me*, the lands be in non-entry before confirmation;—*See* CONFIRMATION.

Three consecutive sasines liberate from bygone non-entries;—*See* PRESUMPTION.

Whether the lands fall in non-entry by the death of the adjudger or his debtor;—*See* VASSAL.

Implied discharge of non-entries;—*See* IMPLIED DISCHARGE.

Non-entry, whether *debitum fundi*;—*See* PERSONAL AND REAL.

Non-entry requires declarator;—*See* DECLARATOR.

*See* GIFT OF NON-ENTRY.

*See* APPENDIX.