1677. *July* 24.

LORD MELVILL, and DAVID MELVILL, his Son, *against* Sir WILLIAM BRUCE.

No 37.
An apparent heir being debarred from entering, while there was a possibility of the existence of a nearer heir, the lands were found to be in non-entry; but that the King had no right to the fruits, as *bona vacantia;* and as the heir was neither *in culpa* nor *mora*, the non-entry was not extended to the full mails and duties; but these were found to be *in hæreditate jacente*, to be managed by a *curator bonis*.

THE Earl of Leven having tailzied his estate to the heirs of his own body; which failing, to the Earl of Rothes's second son; which failing, to the Lord Melvill's second son; the Earl of Rothes passed a gift in Exchequer of the non-entry of the estate of Leven, and David Melvill, second son to the Lord Melvill, raised brieves, for serving himself heir of tailzie; which being advocated of consent, and a declarator raised of the Chancellor's gift, which was in the name of Sir William Bruce, containing a conclusion, that there could be no heir served, while there was a second son of the Earl of Rothes in possibility; the LORDS stopped the service of David Melvill, and declared Sir William Bruce his gift of non-entry, reserving to the special declarator, whether the mails and duties were carried by that gift, or whether the same were *in hæreditate jacente*, or caduciary, as *bona vacantia.* Sir William Bruce pursues the tenants for mails and duties before the Sheriff. The Lord Melvill obtained a gift from the King of administration of this estate, as *curator datus bonis*, whereby he might manage the estate, and do all deeds active and passive, that a tutor might do, being always countable to the heirs of tailzie, who should thereafter enter. He did also raise advocation of the process before the Sheriff, at Sir William Bruce's instance, which the LORDS did advocate; and Sir William Bruce insisted for the mails and duties upon two grounds, both contained in the gift, *viz.* as donatar to the non-entry, and as belonging to the King, as *bona vacantia et nullius.* The defender *alleged*, 1*mo*, That there could be no non-entry in this case; because, by the general feudal customs, non-entry importeth the loss of the fee, if the vassal's heir, within year and day, obtain not *renovationem feudi*, whereby non-entry is a most penal casualty of superiority; but our customs do only allow, that for neglect or contempt of the vassal's heir, lying out unentered, the superior should have the non-entry, which imports the new retoured duties only, until the superior insist in his special declarator for the whole duties; for, as Craig saith, 'De non introitu mitiores pœnæ nobis semper placuere;' but both by the common, and our particular feudal customs, non-entry is penal, and, therefore, can never take place but *in culpa*; and if, by such tailzies as this, a donatar might have the whole fruits during the possibility of an heir of tailzie, all vassals and creditors should be destroyed; for as, in this case, the second son of the Earl of Rothes is preferred; so if it had but said, the second son of the Earl of Rothes, it would have suspended the non-entry, so long as the Earl of Rothes could have had a second son; and so the King should be excluded from all casualties, the creditors from all access to the estate, the vassals could not be entered, the rights and interests of the estate could not be pursued or defended, but the donatar should have

No 37. all, who is liable to pay no debt; and, therefore, seeing here David Melvill offereth to enter, and is debarred, he is neither *in mora* nor *culpa*, so that there can be no place for non-entry, but the profits of the estate are *in hæreditate jacente, quæ supplet vicem hæredis*, and a *curator hæreditatis jacentis*, who is like to *hæres fiduciarius*, or a tutor, may do all deeds for the good of the estate, the vassals and creditors, and be accountable to the next entering heir, whereby the debt of the estate should be satisfied, and it should fall to the next heir honourable and opulent, which is equally advantageous to the present and expected apparent heir; so that if the Chancellor should have a second son, all the benefit would accresce to him; whereas, otherways, the memory of this, and all such families, would become extinct, and the defunct, by preferring the Chancellor's second son to his own agnates and blood, should give the Chancellor an occasion by a gift, not only to lay his honour in the dust, during the Chancellor's life, but to destroy his memory and family forever; for, though the Chancellor hath taken the gift, with the burden of the current annualrents, yet nothing is provided for bygone annualrents of principal sums, who, if they could find any legal access to the estate, will certainly adjudge; which adjudication will expire within few years, there being none to instruct the rental, which being made low, and a fifth part added, will exhaust the estate, burdened with two liferents, whereunto the Chancellor hath much more reason to take right, than to this gift; but if this course will be allowed, posterior donatars will take no burden of debt, and so will soon attain their design. Likeas, there is far less ground to pretend right to these rents, as *bona vacantia*, which are not *nullius*, but are *in hæreditate jacente;* and whenever an heir comes to enter, he will have right to all the rents from his predecessor's death; so that David Melvill, who is *hæres apparens sub conditione suspensiva*, is truly *dominus;* and, therefore, as all heirs apparent, even before entry, transmit the rights of the rents to their nearest of kin, or executors, for all the years of their life, though they never enter, and which will fall to their superior by their liferent escheat; so David Melvill, though he be debarred *pro tempore*, is truly *dominus* of the fruits, so soon as the suspensive condition is purified. It was *answered* for the pursuer, That the ground of the non-entry is neither through fault nor failzie of the vassal by our customs, and requires no more but the naked *non introitus* of the vassal, whose *dominium utile* doth only exclude his superior's *dominium directum*; so that when the vassal is out, the superior is in, *ex natura rei;* and though the vassal were *in utero*, the fee is in non-entry, and yet he is capable of neither contempt nor neglect; so when the vassal's retour or infeftment is reduced, his fee is in non-entry *ab initio*; and in this case, the Lords, by their decreet *in foro*, have declared the estate of Leven in non-entry, and have only reserved the mails and duties to be debated in a special declarator; so that it is *res hactenus judicata* in this very case; and so long as the gift stands, it cannot be questioned; and albeit the favourable rental of the new retour be allowed before citation, the special declarator is still

declaratoria juris, which doth not give, but declare the superior's right to the duties. As to the second head, if there were any specialty in this case, as to the mails and duties, they must belong to the King and his donatar, as *bona vacantia*; for though of old, all moveables were allodial, *et cedebant occupanti* where they were *nullius*, and as to some moveables do so continue, yet, by the law and custom of all Princes and States, they have redacted *bona vacantia quæ sunt nullius in publicum ærarium*, as treasures, wreck, weath, &c. for they could defray public expenses no easier way, than by attributing thereto *ea quæ sunt nullius*; and in this case, such tailzies being now ordinary, and passing of course in Exchequer, if non-entry take no place, the King may be excluded from all casualties, if he have no right to the fruits, as *bona vacantia*. It was *replied* for the defender, That neither the reasons nor instances adduced import any thing as to the fruits; for there is nothing more certain, than that non-entry is not extended beyond the retoured duties, unless the vassal be contumacious; as if the apparent heir be *in utero*, though the non-entry might extend to the retour duties, or though the retour were reduced as null *ab initio*, the feu would be in non-entry; but was it ever sustained to reach the full rents from the citation of the general declarator, but only from the reduction of the retour; and, therefore, any probable ground to excuse contumacy doth always restrict the non-entry to the retour duties, and defends, in the special declarator, the fruits for the apparent heir; and, therefore, in this case, there being no pretence of contumacy, but an heir offering to enter, and holden out upon pretence of possibility, the matter is entire, as to the mails and duties, by the reservation in the former decreet, which certainly hath moved the Lords to grant that reservation. No 37.

THE LORDS found the estate of Leven in non-entry, and that the King had no right to the fruits, as *bona vacantia*; but seeing the heir was debarred from entering, and was neither *in culpa* nor *mora*, they have found the non-entry not to extend to the mails and duties; but found the same to be *in hæreditate jacente*, to be managed by the *curator bonis datus*.

Fol. Dic. v. 2. p. 6. Stair, v. 2. p. 545.

1687. *July.* DUKE HAMILTON *against* LADY CALLENDER.

No 38.
Tenants who had *bona fide* paid to a liferentrix, were assoilzied from all bygones, and decerned to pay, only from the date of the decree of declarator.

IN a special declarator, at the instance of the Duke and Dutchess of Hamilton against Lady Callender, to whom, as liferentrix of the lands of Mumrels, the tenants had made payment *bona fide*,

Alleged for the defender: He could not be liable as intromitter, in respect the Duke, as a party engaging for her, and consenting in her contract of marriage, and one at whose instance execution was appointed to pass, was bound