

*Alleged* for the defender, The saids lands, not being expressly contained in the pursuer's right, they can only be claimed as part and pertinent. And since the defender denies that they are part of the Lordship of Torthorral, and asserts, that he and his predecessors have stood vassals therein to the King, for the space of forty years, the pursuer ought, *ab initio*, to make up his title, by proving that they are part and pertinent.

*Answered* for the pursuer, The defender, if he controvert the pursuer's right of superiority, may disclaim it upon his peril.

THE LORDS found the pursuer needed not prove part and pertinent, but that the defender might disclaim upon his hazard; the process not being designed to take away the defender's property, in which case the allowance had been relevant, but only for claiming the casualties of superiority, where no other superior was competing.

Thereafter it being *alleged* for my Lord Annandale, That the pursuer must condescend how long the lands have been in non-entry, and by whose death, and must cite the apparent heir of the defunct *in initio litis*, as proper contradictor, the defender being a singular successor.

*Answered*, The pursuer being a singular successor to the superiority, he cannot know who were the vassals that died last vest and seised, which the defender may know by the writs. And if he will condescend upon the apparent heirs of the vassal last infeft, the pursuer will call them *cum processu*. And any superior may claim the retoured duties thirty-nine years back, unless the vassal can instruct how long the lands were full.

THE LORDS sustained process, unless the defender will condescend who represents the person last infeft, to the effect the pursuer may cite them *cum processu*. See SUPERIOR and VASSAL.

*Fol. Dic. v. 1. p. 137. Harcourt, (NON-ENTRY.) No 731. p. 207.*

1686. December 15. DUKE HAMILTON against LADY CALLANDER.

DUKE Hamilton pursued the Lady Callander, for declarator of non-entry of the lands of Mummerills, which was a part of her jointure. *Alleged*, The Duke was *in mala fide* to claim the non-entry of these lands, because he is a party-contractor, at least a consentor in her contract of marriage, and at whose instance execution is ordained to pass, for securing her in her liferent lands; and therefore he should have seen her infeft. *Answered*, *imo*, He being the superior, cannot be deprived of his casualties by this remote interest. *2do*, He intended this pursuit of non-entry in her husband's time, and so gave her fair warning to secure herself in the lands, and *sibi imputet* if she and her husband neglected it. THE LORDS, on report, repelled the defence, and found the lands in non-entry. But this being stopped, and heard on the 12th of January 1687, the LORDS found his decret of declarator null, because it being libelled, that it fell by the death of James Earl of Callander in 1674, the Earl of Linlithgow

No 69.

A singular successor, found unnecessary to cite the heirs of the person last infeft. If the defender were to condescend on them they might be cited *cum processu*.

No 70.

A decret of declarator of non-entry was found null, because it being libelled, that it fell by the death of the last heir, his heir of line was not called.

No 70.

his heir of line was not called, though the Duke alleged there was no necessity to cite him.

1687. *July 16.*—THE Duke of Hamilton having obtained a decret of non-entry against the Countess Dowager of Callander of the lands of Mummerills, as mentioned 15th December 1686, there is a reduction of it raised on this ground, That it was null, because the Earl of Linlithgow, the heir of line, was not called, who may have defences. THE LORDS found the decret null; whereon the Duke applied for a new hearing in presence, and *alleged*, That he needed not cite the apparent heir, unless he were in possession; and that, in 1683, (No 69. p. 2210.) in a non-entry pursued by the Duke of Queensberry against the Earl of Annandale, the LORDS sustained process, and allowed the heir of line to be called *cum processu*, as they had done before, between the same Queensberry and Craik of Stuarton. *2do*, The omitting Linlithgow in the decret was only a mistake; for now they produce an execution against him. *Answered*, They offered to improve it, and craved the Duke might abide at its verity; who alleged he was not further concerned than that it was truly so delivered to his writers and agents by the messenger; yet the LORDS would have him abide by it simply.

*Fol. Dic. v. 1. p. 137. Fountainball, v. 1. p. 437. & 467.*

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S E C T: XVII.

Citation in Recognition.—Regress upon Excambed Lands.

1584. *March.*K. ADVOCATE *against* M'CULLOCH.

No 71.  
The Lords found it not necessary, in a process of recognition, to call the parties in whose favour the alienation was made, altho' *vel maxime res eorum agebatur.*

THE King's Advocate and the Laird of Bargammie as having the title of the lands and barony of Cardmangs, become in our Sovereign Lord's hands by way of recognition, pursued M'Culloch, and her husband for his interest, the heritrix of the same lands and certain other persons, to whom there was an alienation made of the one half of the lands, by the consent of our Sovereign Lord, immediate Lord of the said lands. It was *alleged* in *ingressu litis*, because the K.'s Advocate and the donatar passed frae all the vassals to whom the alienations were made, that they might not pass frae them, and they ought to have been summoned *ab initio*, and had good interest to defend the cause *quia eorum res agebatur*, for if there were decret of recognition given, their infestments would fall, and they had but to seek warrandice against the heir, who wad tyne nothing to warrand unto them. It was *reasoned* upon the