

charged and denounced for not fulfilling of the bond; thereafter the creditor pursues the said debtor, and the Bailies of Montrose, viz. the debtor to give him infestment, and if he do not, the Bailies to infest him; and the party being absent in the process, it was found, that the order could not be sustained against the Bailies, and that the act of Parliament of tinsel of superiority of those who enters not thereto, being charged to that effect by vassals, as the act prescribes, militates not to produce this action.

Clerk, *Gibson.*

Durie, p. 474.

No. 25.

1632. *March 24.*

HAY *against* L. ACHNAMES.

James Hay seeking declarator of Achnames's life-rent of escheat of the lands of _____ holden of the said James; and Achnames alleging, that no life-rent can fall to James Hay, because he was infest in these lands, holden of the Prince upon James Hay's contumacy, for refusing to infest him, so that the benefit of the life-rent thereby cannot belong to him; this allegiance was repelled, for the infestment granted by the Prince, for the immediate superior's disobedience, or refusal to receive his vassal, was found a good and lawful reason to exclude all non-entry, which the superior might seek for the vassal's non-entry, seeing the superior was charged, and refused; and the entry by the Prince was found to purge the same, and to supply that defect; but it was found nowise to exclude the immediate superior from any other casualties of his superiority, which otherwise might belong to him as ward, life-rent, recognition, and others; and also the duties, if any were payable by the tenor of the infestment, are due to the superior, notwithstanding of the vassal's entry by the prince; for these casualties accresce to the superior for the fault of the vassal's self, wherein the superior cannot be hurt *sine sua culpa*, but in the non-entry he is prejudged for his own fault, for therein habet seipsum auctorem culpæ, et non vassallum, et in aliis vassallus est auctor culpæ, et delictorum, et non dominus.

Act. *Gilmore.*

Alt.

Clerk, *Hay.*

Fol. Dic. v. 2. p. 408. Durie, p. 633.

No. 26.

Penalty for refusing to enter vassals.

1749. *June 21.*

JAMES COOK *against* DICK of Grange.

Dick of Grange obtained a decret of non-entry of certain lands feued by him, whereupon houses had been built, which was reduced at the instance of James Cook, an adjudger, and he found liable to account; and in the accounting, the Lord Ordinary, 23d July, 1748, "sustained a claim of annual-rent of money advanced by Grange, for the repairs and meliorations of the subjects in controversy,

No. 27.

A superior possessing on a decree of non-entry, which was afterwards reduced, it

No. 27.
was found the rents received imputed first to the feu-duties, and next to reparations.

and found the same, with the by-gone and current feu-duties due to him, and the rents chargeable against him ought to be stated periodically." And 28th November, "found that the rents ought to be applied in the first place for payment of the expenses of repairing the respective houses, for which the rents became due, and annual-rents thereof; and after paying these, for payment in the next place of the feu-duties."

Pleaded in a reclaiming bill: The rents received by the petitioner, who was creditor in the reparations and the feu-duties, must as an indefinite payment be applied first to the feu-duties, which are found not to bear annual-rent, especially considering that the feu-duties are a preferable debt on the subject.

Answered, The rents only arise after deduction of the necessary reparations.

The Lords, 9th June, found that the rents were to be applied in the first place to the extinction of the feu-duty, and this day refused a bill, and adhered.

Act. *A. Macdonall and Lockhart.*

Alt. *Hay.*

Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No. 69. p. 75.

* * See a case between the same parties, No. 7. p. 1724. *voce* BONA FIDE CONSUMPTION.

1802. July 1.

DICKSON *against* LORD ELPHINSTONE and CHARLES ELPHINSTONE.

No. 28.
Tinsel of superiority takes place if the superior does not, on requisition, enter his vassal.

Lady Clementina Fleming, who died 1st January, 1799, was the last person feudally invested in the estate of Biggar, and all the lands holding of it, which have since fallen in non-entry, have continued in that state. Among these were the lands of Persielands. The Reverend David Dickson, the proprietor, wishing to make up his titles, found he could not obtain a charter, as it was not settled which of Lady Clementina's two sons, Lord Elphinstone, or his brother Charles, was the heir of entail. Dickson executed a special charge, (26th May, 1801,) against both of them, and then applied to the Court of Exchequer for a charter *supplendo vices*; but it was found necessary first to bring an action of tinsel of superiority before the Court of Session, in which the defenders pleaded, That they had taken measures to remove the doubt which had hitherto prevented them from making up their titles.

The Lord Ordinary, (16th June, 1802,) "in respect of the reasons assigned for the delay in making up titles in one or other of the defenders, and as it is set forth, that an action has been raised for removing the difficulties that have occurred, sists procedure in this action till the third sederunt day in November next, with certification the Lord Ordinary will then proceed to give judgment in the cause."

On reclaiming, the pursuer

Pleaded: Neither an heir nor a disponee unentered can exercise any substantial right of property over his own lands; he cannot pursue a removing against his