

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

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 su-
periority
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

tenant ; he cannot settle provisions upon his wife and children ; nor can he burden them in any way, however advantageously it may be for him : He cannot therefore remain long unentered, without, in some cases, evident loss, and in all very great inconvenience. For several years, this has been the situation of the pursuer ; and the only answer made is, that an action is raised, which at some future period will obviate the difficulty. As it cannot be foreseen when this question will be determined, the pursuer cannot be obliged to wait the issue of a tedious contest, when the law has provided a remedy, by an application to the over-lord, in terms of the act 1474. C. 57.

The defenders

Answered : The statute does not apply to this case, when, by causes independent of his will, and obstacles over which he has no controul, the superior has himself been prevented from entering to a valuable estate, but only to the case where, by gross neglect or actual fraud of the superior, the vassal has been injured by his lands remaining in non-entry ; for it requires the superior, “ but fraud or gile,” to enter the vassal within forty days after being required ; and if he “ fraudfully differris his entrie,” he shall tyne his tenant for his lifetime. This forfeiture is penal, and common law requires an action of declarator to this effect, which is not an action of mere form, but to determine whether a delict really has been committed. In this case, a doubt existing, to which of the defenders the right to the estate of Biggar belongs, has retarded the completion of the feudal rights of the estate, which their absence from home, in the service of their country, has increased ; but an action for this purpose is now in Court, and the form of a competition of titles admits of a speedy termination.

The Court held, that in this as well as in other old statutes, “ fraud and gile” were synonymous with being in prejudice of the vassal ; and as it was a serious prejudice to him to lie out unentered, that he could not be obliged to remain in this situation longer, till a doubt which might long ago have been brought to an issue should be settled.

“ The Lords, &c. find, That the defenders have amitted and lost their right of superiority of the lands libelled, with the whole benefit and casualties of superiority libelled, and others that might have been payable out of the lands and others foresaid, and that during all the days of the life-time of the pursuer : Also find, That the pursuer, his heirs and successors, have right to obtain themselves infest in the said lands by his Majesty, the immediate lawful superior of the said defenders, or their predecessors, in the foresaid lands, and that by virtue of a signature to be granted in Exchequer, in favour of the said pursuer and his foresaids, to be holden the said whole lands and others, during all the days of the lifetime of the said pursuer, of his Majesty and his royal successors, as superiors thereof, for payment of the feu-duty and others foresaid, as freely in all respects as the same might have been held of the said defenders, or either of them, having right to enter heir, as aforesaid, if they, or either of them, had been entered and infest in the superiority of the foresaid lands and others : And find, that the said entry shall be as va-

No. 28. lid and effectual to the pursuer, and his foresaids, in all time coming, as if the said defender, or one or other of them, had been entered and infeft in the superiority of the foresaid lands, and thereafter the pursuer had been entered and infeft in the property thereof, as vassal to the said defenders or either of them; and decern and declare accordingly."

Lord Ordinary, *Balmuto.*
For the Vassal, *Dickson.*

For the Superior, *Glassford.*
Agent, *A. Gibson, W. S.*

Agent, *R. Hill, W. S.*
Clerk, *Menzies.*

F.

Fac. Coll. No. 51. p. 104.

SECT. VIII.

A Superior may compel his Vassal to enter, but not entitled to Infeft him without his consent.

No. 29. 1581. *January.* EARL OF EGLINTON *against* LAIRD OF CALDWALL.

The Earl of Eglinton pursued the Laird of Caldwell, who had a piece of ground holden in ward and relief of the said Earl, whereof also the ward was disposed to the said Laird by the said Earl to enter to the said land, the ward being run forth, to the effect the said Earl may be served of a tenant into the said lands, and receive all other duties and services belonging to the same. It was answered to the summons for the part of Caldwell, that in nowise he could be compelled to enter to him tenant of the said lands, because the said Earl had disposed the same ward to him; nor yet pay any mails or duties of the same, because the same, by reason of the disposition, appertained to him. To this was answered, that the disposition of the ward was but unto such time as the heir was of perfect age to enter, and now the heir being of perfect age to enter, he could not lie furth to the prejudice of the over-lord and superior. The which allegiance was found relevant by the Lords, and pronounced him to enter, and found that the vassal might be compelled to enter, as the superior might be compelled to receive the tenant or vassal.

Fol. Dic. v. 2. p. 408. Colwill MS. p. 319.

No. 30. 1582. *March.* LAING *against* SCRYMGEOUR.

Mr. John Laing, being provided to the pensionary of Brechin, pursued one Scrymgeour, as nearest and apparent heir to another called Scrymgeour, to enter to certain lands, alleging the same to appertain to him in feu-farm holden of the