

said pensioner, and that to the effect the said pensioner might be certified of him who was to be his vassal, and who should pay to him the mails and duties of the lands holden of him. To which it was answered by the defender, that the pursuer could have no direct action to pursue him to enter against his will, but if the vassal lay forth and entered not, he had other ordinary remedy, the non-entry of the lands, or the reduction of the titles, for not payment, *et ubi quis habet ordinarium remedium non opus est extraordinario*; and so the lying forth of the vassal could not prejudice the superior in any sort, but would rather be locupletior thereby. The Lords nevertheless found, by interlocutor, that the superior had good action to pursue the vassal to enter, and that conform to a practick past of before, betwixt the Earl of Eglinton and the Laird of Caldwell, (*supra.*)

Fol. Dic. v. 2. p. 408. Colvill MS. p. 358.

No. 30.

1671. December 8.

BLACK against ELLEIS.

Mr. Robert Black being donatar by the Duke of Hamilton, pursues non-entry of certain of his vassals; who alleged absolvitor, because the land was full by infeftments taken from the usurpers, partly by the heirs of the vassals, and partly by apprisers, who must maintain the obtainers in their rights, in respect of the act of Parliament 1661, ratifying such infeftments, and that these infeftments were necessarily taken when the family of Hamilton was forefault, and they cannot be compelled to renew the same during their life, seeing the act bears expressly, that the ratification is made for the ease of the lieges. It was answered, that the fore-said act could only relate to lands holden of the King immediately; *2do*, The said forefaulture being most unjust, and rescinded, all infeftments founded thereupon fell in consequence; and though these infeftments might be a colourable title before citation, yet now the vassals ought to renew their infeftments, and the apprisers pay the composition, getting allowance of what they paid to the usurpers.

The Lords found that the vassals could not be compelled to take new infeftments, being either such as were heirs entered by the usurpers, or apprisers infeft, but did forbear to give out their interlocutor, till endeavours were used with the defenders, to see what they would do of consent.

Stair, v. 2. p. 20.

No. 31.

Effect of the superior's forfeiture.

1794. November 12. DAVID STEWART, against JAMES BURNSIDE.

Sir John Maxwell's commissioners granted a feu-disposition to James Burnside, his heirs and assignees, which was made out by David Stewart, writer to the Signet, Sir John's man of business, who also took infeftment on the precept, and extended the sasine, without having received any orders from Burnside to that purpose.

No. 32.

A superior is not entitled to infeft the vassal in a feu-right, without his consent, nor to insist

No. 32.

that the infestment shall be expedite by his own man of business.

Mr. Stewart afterwards brought an action against Burnside, for payment of £.3 19s. 1½d. as the expense of the feu-disposition and infestment.

The Lord ordinary found "the defender liable for the articles charged in the said account, in so far as relates to the execution of the disposition by Sir John Maxwell's trustees, in favour of the defender, amounting to £.1 13s. 6½d. Sterling; but in so far as the articles in said account relate to the instrument of sasine, and taking infestment thereon, in respect it is admitted the defender did not employ the pursuer to extend said instrument, or take infestment thereon, found the pursuer can have no claim against the defender, for payment of said articles.

In a reclaiming petition, the pursuer

Pleaded: As the superior is obliged to give, so the vassal is bound to take immediate infestment. If he were not, he might, by assigning the unexecuted precept of sasine, disappoint the superior of the year's rent which he is entitled to on the entry of a singular successor. Besides, till the original grantee is infest, the superior is without a vassal, which is contrary to feudal principles. Neither could the superior in this case force the grantee to take infestment, by bringing a declarator of non-entry, this being a remedy competent only against the heirs of vassals, who have themselves been entered: The proper way therefore of enforcing his right, is to infest the vassal before he parts with the disposition, and to deliver it and the instrument of sasine to him at the same time, consequently these writings must be made out, and the infestment taken by the superior's man of business.

Observed on the Bench: The petitioner's doctrine has no foundation either in law or practice. As the disposition is granted to "assignees," the vassal is clearly entitled to assign the unexecuted precept.

The Lords, by a great majority, refused the petition, without answers.

Lord Ordinary, *Henderland*. For the petitioner, *Maclaurin*. Clerk, *Home*.

R. D.

Fol. Dic. v. 4. p. 312. Fac. Coll. No. 129. p. 293.

SECT. IX.

Superiority belonging to Heirs-Portioners.

1678. July 30. The LADY LUSS against INGLIS.

No. 33.

The vassal is not obliged to take infest-

The deceased Laird of Lochend having died infest in the lands of Newtoun-leys, held of Mr. William Kellie, there is a pursuit raised at the instance of the Lady