

1630. December 18. STARK against L. AIRTH.

No 21.

A superior being denounced rebel for not entering a vassal, and the next superior having resigned the superiority in the King's hands; it was found, that the Director of the Chancery might issue precepts for infesting the vassal, to be holden of the King.

IN an action by one Stark against the Director of the Chancery and the L. of Airth, making mention that the pursuer, by contract betwixt him and the L. Airth, had taken the Laird of Airth obliged to infest him in the lands of _____, which the Laird of Airth held of Sir James Cleland of Monkland, and that the pursuer had denounced the Laird of Airth rebel for not doing thereof; likeas Sir James Cleland had resigned his superiority in the King's hands, according to the universal order taken by the submitters concerning kirklands; and therefore, that the pursuer ought to have precepts out of the Chancery, for infesting of him to be holden of the King; this being referred to the LORDS, if this action should be sustained, the LORDS sustained the same, and found, That there was no necessity to summon Sir James Cleland to this pursuit; it being libelled in the summons that Sir James Cleland had resigned his superiority in the King's hands, which the LORDS found should be proved; and being proved, his interest ceased, and so he needed not to be summoned; neither needed any further action to be pursued, before these precepts out of the Chancery were directed against the L. Airth, the pursuer's author, to obtain himself infest; that thereafter the pursuer might be validly infest, seeing the pursuer had upon the said contract denounced the L. Airth rebel, for not infesting of the pursuer; which the LORDS found sufficient, and to comprehend that into it, viz. to infest himself, that so the pursuer might be validly infest, without the which the pursuer could not be validly secured; and so the action was sustained upon these two grounds, but any further, viz. upon the L. of Airth's being at the horn, for not infesting of the pursuer, to be holden of Sir James, and his resignation of the superiority; for if Sir James had, upon refusal of precepts out of the Chancery, disobeyed to have infested his vassal, the King, as use is in such cases, would have infest the vassal, in place of the immediate superior disobeying, *quo casu* the feu-duties and other casualties would appertain not the less to the immediate superior of the vassal, and not to the King, who but supplied the fault of the immediate superior; even so the resignation made by the L. Airth's immediate superior ought to produce the same effect.

Clerk, Gibson.

Fol. Dic. v. 1. p. 470. Durie, p. 549.

* * * Auchinleck reports this case:

By contract one is obliged to infest another in lands annalized by the said contract; the seller dies before the infestment be expedie; the buyer charges the apparent heir of the seller to enter heir to his father, to the effect he may infest the buyer, conform to the contract, and for his disobedience denounces him at horn. Thereafter he charges the Director of the Chancery by letters, to give

him out charter and precept of poinding of the said lands.—THE LORDS sustained the action.

No 21.

Auchinleck, MS. p. 107.

1668. *June 25.* GEORGE HERIOT *against* TOWN of EDINBURGH.

No 22.

GEORGE HERIOT's father being infest in an annualrent out of certain tenements in the Canongate, obtained himself to be served heir in special therein, before the Bailies of the Canongate; and because the same is within a regality, having a proper chapel, and was not to be retoured to the King's Chancery, so that precepts were not to be had out of the Chancery against the Town of Edinburgh, superiors, to charge them to infest him; therefore George, upon supplication, obtained letters from the Lords to charge them, and they being now charged, he pursues a poinding of the ground.—It was *alleged* for the Town, no process for poinding of the ground, till the pursuer was infest in the annualrent.—It was *answered*, That he having done diligence against the Town, it was equivalent, and did exclude them from proponing that allegiance.—It was *answered*, That no personal objection against the Town could be a sufficient title against this action without a real right.

A party was served heir in special before the Bailies of Canongate, which being a regality, there was no retour to the Chancery, so as to obtain precept to charge the superior to infest. The Court declared, that after the superior had been denounced, they would grant warrant to the Director of Chancery to issue a precept.

THE LORDS found no process till infestment; but declared, that so soon as the Magistrates should be denounced, they would grant warrant to the Director of the Chancery to issue a precept for infesting the pursuer, for supplying the place of the Magistrates and their contumacy. See PERSONAL OBJECTION.

Fel. Dic. v. 1. p. 470. Stair, v. 1. p. 543.

. This case is reported by Gosford:

GEORGE HERIOT being served heir to his father, to an annualrent out of a tenement of land in the Canongate, whereof the Town of Edinburgh were both superiors, and had acquired the right of property, and having required the Magistrates to infest him, did thereupon pursue a poinding of the ground.—It being *alleged*, That he could not pursue unless he were infest; this allegiance was found relevant, notwithstanding that it was *replied*, That the defenders were superiors themselves, and being required, were *in mora*; because the LORDS found, That albeit a retour and a charge against the superior were sufficient to pursue an action for mails and duties, yet it was not a good title to poinding of the ground without an infestment; and the said tenement lying within the regality, they would not ordain a precept to be direct out of the Chancery, for infesting the pursuer to be holden of the King upon a simple resignation; but ordained first that letters should be raised to charge the superiors, and they denounced, before that they should ordain precepts to be direct out of the Chancery.

Gosford, MS. No 8. p. 4.