

S E C T. VI.

Method of obtaining infestment where property and superiority coincide in one person.—Method of obtaining it by a singular successor, after resignation is accepted of.—Where the precept does not specially mention the lands.—Method of infesting a Remainderman.—Where a disposition is adjudged, not containing precept of sasine.—Base infestment competing with a public right.

1634. June 21.

B. Supplicant.

This day a supplication was given in to the Lords by ———, propositing, that he was prebendary of ———, of the which prebendary the lands of ——— were holden; and of which lands, he was heritor, so that he could not grant a precept by himself to himself, to take sasine of these lands, and therefore craved a warrant to the director of the Chancellory, to give out precept and charges to the Sheriff of the shire, to give him sasine of these lands. This supplication was granted; for it was considered by the Lords, that no person could have prejudice thereby, and that it was also needlessly craved by the supplicant; for he being heritor of that land, which held of a prebendary, of a kirk benefice, viz. the priory of Creil, and he being also prebendary himself, during his lifetime, of that prebendary, whereby he became for his lifetime superior to himself of these lands, he might as prebendary infest himself as heritor, by his precept direct as prebendary, for he had two relations; and this was of old done by the Earl of Bothwell, who being prior of Coldingham, and heritor of lands holden of the said priority, directed precepts, as prior, to infest himself as heritor, and the same was found lawful and sustained; but I like the form desired by this supplication rather, whereby there was no such confusion as is in properties and superiorities, where the superiorities are also heritable, *quo casu* the property accrescing to any who is heritable superior, there is no necessity of a new sasine, seeing the sasine of the superiority, will carry with it the property, where there is no other proprietor; but it is not so in those benefices conferred upon persons, temporally provided for their lifetime, where their provisions may give them right to the fruits of all belonging to their benefices during their lifetime, but will give them no longer right to any lands, or other things holden of that benefice, without a new right lawfully acquired and established in their person. See CONSOLIDATION.

Fol. Dic. v. 1. p. 471. Durie, p. 719.

1668. November 26. The DAUGHTERS of MR JAMES MORTON Supplicant.

THE daughters and heirs of Mr James Morton gave in a supplication to the Lords, making mention that their father being infest in an annualrent, effeiring

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Where the property and superiority coincide in one person, he, as superior, may either grant a precept for infesting himself as vassal; or obtain a warrant to the director of the Chancery to issue such precept.

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Found in conformity with the above.

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to the principal sum due to him by the Lord Balcombie, they did thereafter obtain decret for the principal sum, and thereupon apprising the property wherein they stand infest, holden of the King; in which apprising there is a reservation exprest, without prejudice of the infestment of annualrent; and now being desirous to be infest in the annualrent, as heirs to their father, and that themselves were superiors by the infestment on the apprising, and conceived it proper for them to infest themselves, did therefore desire the Lords to grant warrant to direct precepts forth of the Chancery, for the King to infest them.

The Lords having considered the case, and argued the matter amongst themselves, whether it were more secure and legal that they should be infest by the King upon their supplication; or that they as having right to the property by their infestment on the apprising, should grant precepts for infesting themselves in the annualrent, as heirs to the annualrenter; or whether their infestment in superiority would consolidate the annualrent without infestment; the difficulty against the King's infesting of them was, that the King infests none but those that hold immediately of him, or upon the disobedience of the immediate superior, *supplendo vices*.

To which it was *answered*, That the King may supply the place of the immediate superior, either when he will not, or cannot infest his vassal, and the petitioners conceive that in this case they cannot; and both being extraordinary remedies, the Lords may do the same, and have done it in former cases. The difficulty as to infesting themselves was, that the right of property, and *jus nobilius*, did extinguish the right of annualrent; and yet the right of property may be reduced, and then they would be necessitated to defend themselves by the annualrent; and therefore it is not an absolute extinction, but *in tali casu*; and therefore they have reserved the same in the apprising. The difficulty as to the third way was, that if the right of the superiority should be reduced, they should be without infestment at all.

THE LORDS found that they might either infest themselves by their own precept, or might get precepts from the King, as desired, *periculo petentium*, or they might make use of both together.

Fol. Dic. v. 1. p. 471. Stair, v. 1. p. 567.

* * * Gosford reports this case :

THERE being a bill presented for three daughters of the deceased Lord Balcombie, who were served heirs to their brother, who had right to an annualrent effeiring to 7,000 merks principal, out of the lands of Balcombie, which were holden base of their father, the granter; as likeways, who had comprised the same sum, the property of the said lands, and the superiority of the said annualrent; whereupon they craved that the Lords would ordain the director of the Chancery to give out precepts for infesting them in the said annualrent,

because they themselves being superiors, could not give a precept of sasine for infesting themselves. The Lords having considered the desire of the bill, after a long debate went the way how they might be validly infest, as likewise two practices deduced, whereby the like was ordained in favours of a prebend of church lands, No 33. p. 6917, and in favours of the Earl Bothwell, who was a Lord of erection, which they found not to quadrate with this case; as likewise, that the said sisters might come to a valid infestment by granting bond, whereupon an adjudication might be recovered, and so infestment gotten in name of a third person; they at last did grant the desire of the bill, but ordained the precept to bear *salvo jure cuiuslibet*.

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Gosford, MS. No 54. p. 19.

1740. February 22. LORD BRAGO against The MAGISTRATES of BANFF.

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THE LORDS hesitated how far they could give warrant for a summary charge of horning against the Magistrates, to receive a singular successor for their vassal, upon a disposition and resignation *in favorem*, though such warrant be constantly granted to receive heirs and adjudgers in case of the Magistrates' refusal; and superseded till precedents should be looked for.

Nor was the point after all determined; for, upon the second application, containing such precedents as could be found, the fact appearing to be, that the Magistrates had actually received the resignation, but refused to allow the clerk to make out the instrument, upon a dispute that had arisen, Whether the *reddendo* should be conceived in terms of the more antient charters, or in terms of a later charter of adjudication? THE LORDS had no difficulty to find, that where the burgh had accepted of a resignation, there lay a summary remedy to oblige them to grant a charter; and granted warrant for letters of horning against the Magistrates, to receive the petitioner in terms of the antient investitures, which were particularly described in the interlocutor.

Fol. Dic. v. 1. p. 471. Kilkerran, (SUPERIOR AND VASSAL.) No 3. p. 528.

1742. June 23. WALLACE against DALRYMPLE.

WHERE an heritable bond bore an obligation to infest in an yearly annualrent out of particular lands, and forth of all other lands belonging to the granter, and lying within the shire of Ayr, as the same are enumerated in the granter's infestments, with a precept of sasine in the same precise terms, whereon the notary extended a sasine, in which he comprehended other lands as contained in the granter's infestments than those particularly mentioned in the heritable bond and precept, but without expressing any such infestments to have been produced to him; the LORDS " Found the sasine null as to all the lands

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