

S E C T. XVI.

Citation in Declarator of Non-entry.

1610. June 9.

WEDDERBURN *against* HOPPER.

No 68.

In a declarator of non-entry, the Lords found, that the superior needed call none but his own immediate vassal, and having obtained decreet against him; that he might thereafter get his sub-vassal removed, although he had received the feu-duty from him, and had not called him in the declarator of non-entry.

THE LAIRD of Wedderburn having obtained a decreet of non-entries of certain lands, against Andrew Nisbet his alleged vassal's apparent heir of the same, he preferred an action of removing from the saids lands against him, who *alleged*, that he should be assoilzied, because he was heritably seised therein, and in possession these 20 years; and being urged to condescend whom-by he was infest, and whom-of holden, he declared he was infest by Nisbet, who was infest by Richard Creiff, who was infest by the King, upon the annexation, long before the Laird of Wedderburn's infestment. Wedderburn *answered*, That he was infest upon Richard Creiff's resignation holden off the King, and so Nisbet was his vassal, by whose decease the lands falling in non-entry, and so declared in his Court, he had undoubted right to obtain possession of the saids lands, and bruik them ay and while the entry of his vassal's nearest heir; and could not be debarred therefrom by any subvassal's infestment, not holden nor confirmed by him. Hopper *answered*, That he being infest by him who had power, and by virtue thereof in so long possession, he could not be removed; and that the decreet of non-entries could not hurt him, seeing he was not called to it, and could not be misknown by the pursuer, because the Laird of Wedderburn had pursued him and gotten decreet against him for payment making to the said Laird of his feu mails and duties, conform to the which decreet he had made payment to the said Laird, at least to his officer in his name, having his power. It was *answered*, That if any pursuit was warranted by Wedderburn, it was *propter debitum fundi* which might be exacted of the possession of the lands; likeas this defender was bound by his infestment to pay the feu-duty to the pursuer for relief of his master as his superior's debt. In respect whereof the LORDS repelled the allegiance, and found that Wedderburn had sufficient action.

Fol. Dic. v. 1. p. 137. Haddington, MS. No 1891.

1683. February 16.

MARQUIS OF QUEENSBERRY *against* E. of ANNANDALE.

No 69.

In a declarator of non-entry, against

IN a declarator of non-entry, at the instance of the Marquis of Queensberry, as Lord of Torthorral, against the Earl of Annandale, as heritor of the lands of ———,

Alleged for the defender, The saids lands, not being expressly contained in the pursuer's right, they can only be claimed as part and pertinent. And since the defender denies that they are part of the Lordship of Torthorral, and asserts, that he and his predecessors have stood vassals therein to the King, for the space of forty years, the pursuer ought, *ab initio*, to make up his title, by proving that they are part and pertinent.

Answered for the pursuer, The defender, if he controvert the pursuer's right of superiority, may disclaim it upon his peril.

THE LORDS found the pursuer needed not prove part and pertinent, but that the defender might disclaim upon his hazard; the process not being designed to take away the defender's property, in which case the allowance had been relevant, but only for claiming the casualties of superiority, where no other superior was competing.

Thereafter it being *alleged* for my Lord Annandale, That the pursuer must condescend how long the lands have been in non-entry, and by whose death, and must cite the apparent heir of the defunct *in initio litis*, as proper contradictor, the defender being a singular successor.

Answered, The pursuer being a singular successor to the superiority, he cannot know who were the vassals that died last vest and seised, which the defender may know by the writs. And if he will condescend upon the apparent heirs of the vassal last infeft, the pursuer will call them *cum processu*. And any superior may claim the retoured duties thirty-nine years back, unless the vassal can instruct how long the lands were full.

THE LORDS sustained process, unless the defender will condescend who represents the person last infeft, to the effect the pursuer may cite them *cum processu*. See SUPERIOR and VASSAL.

Fol. Dic. v. 1. p. 137. Harcourt, (NON-ENTRY.) No 731. p. 207.

1686. December 15. DUKE HAMILTON against LADY CALLANDER.

DUKE Hamilton pursued the Lady Callander, for declarator of non-entry of the lands of Mummerills, which was a part of her jointure. *Alleged*, The Duke was *in mala fide* to claim the non-entry of these lands, because he is a party-contractor, at least a consentor in her contract of marriage, and at whose instance execution is ordained to pass, for securing her in her liferent lands; and therefore he should have seen her infeft. *Answered*, *imo*, He being the superior, cannot be deprived of his casualties by this remote interest. *2do*, He intended this pursuit of non-entry in her husband's time, and so gave her fair warning to secure herself in the lands, and *sibi imputet* if she and her husband neglected it. THE LORDS, on report, repelled the defence, and found the lands in non-entry. But this being stopped, and heard on the 12th of January 1687, the LORDS found his decret of declarator null, because it being libelled, that it fell by the death of James Earl of Callander in 1674, the Earl of Linlithgow

No 69.

A singular successor, found unnecessary to cite the heirs of the person last infeft. If the defender were to condescend on them they might be cited *cum processu*.

No 70.

A decret of declarator of non-entry was found null, because it being libelled, that it fell by the death of the last heir, his heir of line was not called.