1799. *March* 7.

JOHN GARDINER and his FACTOR *against* JAMES ANDERSON.

No. 44.
A person who had completed his titles to an heritable subject, conveyed it to his heir-at-law, by a disposition to take effect at death, containing procuratory and precept. The latter sold the subject, and having served heir of provision under the deed, proposed to grant the purchaser a disposition containing an assignation to the unexecuted procuratory; but it was found, that the seller was bound to enter with the superior, and take infeftment before disponing.

George Gardiner conveyed certain heritable subjects, to which he had made up titles under the Magistrates of Edinburgh, as superiors, to his wife and children, whom failing, to his brother John, by a disposition containing procuratory and precept, to take effect at the death of the disponer.

John succeeded his brother, and entered to possession without making up titles, and, when in that situation, sold the subjects to James Anderson, who was acquainted with the nature of John Gardiner's titles to them. No writing at first intervened. Gardiner afterwards served heir of provision to his brother; and, at desire of Anderson, he applied to the Magistrates for a charter in his own favour. They were willing to accept of the composition of a duplicand from him *qua* heir to his brother.

But he afterwards contended, That Anderson could not insist on his entering with the superior, and that it was sufficient to convey the unexecuted procuratory in George's disposition, upon which Anderson might obtain an entry, by paying a year's rent as a singular successor. Anderson having refused to accept of this, Gardiner, who lived in England, and his factor, brought an action for payment of the price; and

Pleaded: The seller of an heritable subject is bound, at his own expense, to grant a conveyance to the purchaser, upon which he may obtain infeftment; but it is the business of the latter to procure the new investiture, and pay the composition to the superior. The seller may even insist on the purchaser entering, and is not obliged to remain in the fee after the sale, by which all burdens, as well as profits, are immediately transferred to the purchaser.

Dispositions, indeed, generally contain a precept of sasine, as well as procuratory of resignation; but the object of the former is merely to secure the purchaser till an entry can be obtained from the superior. It does not increase the obligation of the seller, who may notwithstanding force the purchaser to complete his right. While ward-holding subsisted, a person surely could not be obliged to retain the superiority after a sale. Even in feu-holdings, where the feu-duty is considerable, the seller has a material interest to be divested; and in no case is the purchaser entitled to make the alternative as to the holding a source of hardship to the seller; 10th February, 1769, Dundas against Drummond, *supra*.

Answered: The seller is bound to give a complete feudal title to the purchaser, and if there be any thing doubtful in the progress, to remove it so far as in his power. It is admitted, that he is bound to grant a disposition, and at his own expense; but a person not infeft cannot effectually convey, and it is contrary to strict feudal principles for him to attempt to do so.

The defender has a material interest to insist, that the pursuer shall complete his right, both because it will free the defender from the expense of an entry, and

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all claim at the instance of the superior, during the pursuer's life, and because, as the subject remains *in hæreditate jacente* of the former vassal, the defender at present runs a risk of its being carried off by his creditors or disponees, before the defender's entry with the superior can be adjusted.

The case of Dundas against Drummond was very different from the present. There, the seller, who was himself infeft, had granted a complete right with procuratory and precept. The purchaser took infeftment on the latter, and, after the death of the seller, insisted that his heir should enter with the superior; which it was found he was not obliged to do. On the contrary supposition, the right of the superior on the entry of singular successors would have been wholly evaded; but he has no right to complain of a purchaser holding under the seller, already entered, during his life-time.

The Lord Ordinary found, "That, in this case, the pursuer John Gardiner must complete a title in his person, by entering with the superior, and obtaining a charter, with an infeftment thereon, before granting a disposition in favour of the defender."

Upon advising a petition, with answers, it was

Observed: Wherever the seller can complete a real right to the subject in his person, he is bound to do so at his own expense, unless there be an express stipulation to the contrary. The purchaser is not obliged to accept of a title, which would oblige him immediately to enter as a singular successor.

The Lords, nearly unanimously, adhered.

Lord Ordinary, *Stonefield.* Act. *Craigie.* Alt. *D. Cathcart.* Clerk, *Menzies.*

D. D. *Fac. Coll. No.* 120. *p.* 273.

*** In the course of the action, the pursuer stated, That the children of another brother deceased were George's heirs-at law: That a composition of a year's rent might be demanded from himself; and urged the hardship of obliging him to enter, as his doing so would only save the defender the interest of the same composition, which he must at any rate pay on the pursuer's death. The defender maintained, That the pursuer was George's heir-at-law; and, as the Magistrates were willing to hold him as such, the fact was not important.

1804. *February* 21. MAGISTRATES of MUSSELBURGH *against* BROWN.

No. 45.

A vassal infeft having disponed the subject to his heir, with procuratory and precept, the uperior, though bound to enter the

Captain Richard Dobie obtained, by purchase, certain feus granted by the Town of Musselburgh, and he was infeft on the precepts of sasine contained in the original feu-charters, which had been assigned to him unexecuted. He executed a disposition of these subjects in favour of his son, Adam Dickson Dobie, which contained a procuratory of resignation and precept of sasine. Upon his father's death, the son succeeded, but died without making up any title, and was succeeded by his sister Williamina. She sold the property to Alexander Brown, wood-