No. 44.

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-

merchant in Fisherrow; and, to complete the sale, she expeded a general service as heir to her brother. Thus taking up the unexecuted procuratory of resignation in Captain Dobie's disposition, she applied for a charter of resignation from the superior; which was accordingly prepared by the superior's man of business, but not delivered till it should be explained in whose person infeftment was to be taken. In the mean time, she assigned it over to a purchaser, who insisted, that the charter should be delivered to him, on paying the casuality exigible by the superior from an heir, and that he was not liable for a year's rent.

No. 45. heir upon a precept of *clare constat*, which cannot be assigned, is not obliged to grant a charter upon the procuratory in the disposition, to the effect of enabling the heir to assign it away before infeftment, and thereby to disappoint the superior of his casualty of a year's rent from the singular successor.

The Lord Ordinary pronounced this interlocutor, (8th March, 1803): "In respect that Adam Dickson Dobie, as only son and heir-at-law of his father Captain Richard Dobie, was entitled to be entered in the subject in question as heir to him, under the disposition in his favour as an heir, and not as a singular successor, finds, *first*, That the late Williamina Dobie, his only sister, and heir-at-law both to his father and him, had, as carrying right to the procuratory in that disposition by general service, the same right with her brother to have obtained delivery of the charter made out in her favour, on payment of a double feu-duty as heir, and could not have been obliged to pay a composition as a singular successor; and, *secondly*, That as the defender obtained an assignation to that charter, the precept in which is a sufficient warrant for infefting him in the subject as her assignee, he has, as thus standing in her right, a title to obtain delivery thereof on the same terms on which such delivery must have been made to her, that is, on paying the dues of the same, according to the account thereof in process, and the duty exigible under the original grant from the person entering as heir; and decerns and declares accordingly."

The Magistrates reclaimed, and

Pleaded: Superiors are obliged to give an entry as heir to those only who claim literally in that character, and who, demanding this entry, have been acknowledged by precept of *clare* as the true heirs of the last vassal recognised by the superior, or have it proved by a service. But any person who derives right by a singular title must pay the composition exigible in that character. Where a son, therefore, receives a disposition, containing procuratory and precept, from his father, though *dilioqui successurus*, and makes use of that disposition to the effect of assigning it away before infeftment, he thereby makes himself a singular successor, or, which is the same thing, he puts a singular successor in his place. If his only purpose be to complete his title by a charter, in place of a precept of *clare constat*, he ought to give it the same effect, by taking infeftment upon it in his own person; but if, instead of taking infeftment himself, he assigns the procuratory and precept, either he or the assignee must be liable to pay the casualty due by a singular successor, otherwise the superior's just claim to his casualty would be evaded.

Answered: The charter assigned in this case, and which ought to be delivered, expressly contains a clause to heirs and assignees whomsoever. This last character of assignee, which the respondent enjoys, was inserted by the superior himself,

No. 45. and it gives him the same privilege with his author, which was to enter as an heir. Now, while his author was not bound to take infeftment in her own name, as her right expressly contained assignees, she was at liberty to assign it as it stood; and the superior cannot refuse to give infeftment upon it, to any assignee in whose person it may now stand, upon payment of the same casualty which she was bound to pay.

Observed on the Bench: The heir of a vassal is entitled to be entered as such, on payment of the *duplicando* or other composition exigible from an heir, but he cannot demand such an entry as will enable him to introduce a singular successor in his place, without payment of a year's rent. If, therefore, instead of a precept of *clare constat*, he demands a *charter*, which may be assigned, the superior is not obliged to comply with this, unless satisfaction is given as to the year's rent.

The Lords "alter the interlocutor reclaimed against, and find, that the respondent Alexander Brown, upon receiving the charter before mentioned, must pay to the pursuers the usual composition as a singular successor; also find him liable in expenses."

To which they adhered, (February 21,) by refusing a petition, without answers.

Lord Ordinary, *Bannatyne.* Act. *Rae.* Agent, *T. G. Wright, W.S.*
Alt. *Corbet, Morison.* Agent, *Ja. Skinner.* Clerk, *Walker.*

F. *Fac. Coll. No. 147. p. 329.*

SECT. XI.

Composition due by Singular Successors.

No. 46. A superior is not obliged to infeft a compriser until he is paid a year's duty of the lands.

1614. *February 3.* DALMAHOY *against* BOTHWELL.

In an action of suspension pursued by Dalmahoy against Adam Bothwell, who had comprised some lands holden of Dalmahoy, the Lords found, that Dalmahoy was not obliged to give him infeftment, except he were paid the hail year's duty of the lands the year of the comprising, conform to the act of Parliament made by King James III. *anno* 1469. Cap. 36.

The contrary before, betwixt the Lord Dundas and Ninian Macmorren.

Fol. Dic. v. 2. p. 409. Kerse MS. p. 79.

No. 47. Whether the payment of annual-rent

1623. *December 5.* PATON *against* STUART.

In an action of double-poinding betwixt Paton and Stuart, the Lords found a charter produced for the one party, whereby he desired to be answered and obey-