

to discourage mortifications and purchases by all corporations and societies, which tend very much for the advancing of public policy and pious uses; and which can have no such solid stock as the purchase of land; and neither can an equivalent be condescended upon that could consist with the security of societies, or have a justice and equality to answer the interest of all concerned; for if it should be proposed that a trustee should be named, then questions would arise how another trustee, in case of his decease, should be entered, or what should be the effect of that trustee's delinquency; for which there is no rule nor analogy in law; neither is the damage of superiors so considerable, for the duplication of the feu at the entry of an heir is a mere trifle, and non-entry and escheat are the only other casualties which the superior may lose; and these are merely accidental, such as may not happen in 100 years; and being casualties arising from delinquencies, it is what superiors are not to hope for nor expect; and as to the casualty of entering a singular successor, corporations may sell as well as buy, or their creditors may adjudge from them; so that the superior loses nothing on that side.

“The Lords found the suspender was obliged to enter the charger as any other vassal.”

The like occurred in the case of the Masters of the University of Glasgow, No. 16. p. 9296. *voce* NON-ENTRY, who had acquired an adjudication for sums far exceeding the value of the subjects adjudged; and Hamilton of Dalziel, the superior, declining to enter the University as being a society, “the Lords found, That he must either enter the University, or pay the debt, conform to the 36th act, Parl. 5. Ja. III;” but because the debt exceeded the value of the lands adjudged, “the Lords found, That he should only be liable for so much of the debt as extended to the true value of the lands; which they modified, and gave the superior his choice.”

*Fol. Dic. v. 2. p. 408. Dalrymple, No. 96. p. 135.*

1769. February 10. DUNDAS against DRUMMOND

George Drummond of Blair sold to Thomas Dundas of Fingask, the lands of Quarrol, which he held blench of Charles Elphinston of Cumbernauld; and granted disposition containing procuratory and precept, clause of absolute warrantice, &c.

Mr. Dundas did not execute the procuratory, but took infeftment on the precept.

Upon Mr. Drummond's death, Mr. Elphinston the superior, pursued a declarator of non-entry against Mr. Dundas, who brought an action against Mrs. Drummond, as representing her brother, concluding that she should be decerned to enter with the superior, and against the superior, to receive her.

No. 43.

Found that the heir of one selling with procuratory and precept, is not bound to enter with the superior.

No. 43.

Mrs. Drummond, not chusing to concur in disappointing the superior of his composition, allowed the defence to be carried on in her name; though it was agreed, that, if she was found obliged to enter, it should be at the expense of Mr. Dundas, who would reap the benefit.

Pleaded for the pursuer: By granting a precept, as well as a procuratory, Mr. Drummond put it in the power of Mr. Dundas to hold the lands, either of the immediate or mediate superior. Suppose the disposition had not contained a procuratory, there can be no doubt that the disponent and his heirs could have been compelled to enter with the superior, and must have been liable upon the warrandice for every loss arising from the neglect of it. Nor does it make any difference that a double mode of entry is mentioned; the very meaning of an alternative is, that the party shall have his option; and the right of option is one of the rights which the pursuer holds under the disposition, and which Mr. Drummond and his heirs are bound to warrant, as much as any other right consequent upon it.

Answered: Had the pursuer's demand been understood to be founded in law, it must have been made in innumerable instances; and yet this is the first example of an action of the kind being brought, which shows that it was never imagined, that the heir of a person, who had sold with procuratory and precept, could be obliged to enter with the superior.

And the view of the question must not be confined to the present easy modes of holding, when the taking of an entry may not be attended with any severe consequences. To discover the true principle, it ought to be considered how the case would have stood before the statute of ward-holdings, when, in consequence of the feudal casualties, the vassal might have incurred burdens, to an amount greater perhaps than the value of the feu. It cannot be imagined that one, who sold with procuratory and precept, reserving no interest in the lands, could mean to continue subject to such burdens. And, even as matters now stand, there is no reason to think that he intended to remain liable for the feu-duty, especially when there is no clause in the disposition for that purpose; or to oblige himself and his heirs to be at the expense of entries in all time coming, in order to protect the purchaser from the composition, by keeping up the shadow of a superiority, without any advantage to himself.

The clause of warrandice does not vary the argument. Warrandice is not incurred in consequence of an eviction which happens by the fault of the purchaser: So says Lord Stair, II. 3. 46. Nor is the seller bound to warrant against subsequent casualties of superiority, without an explicit obligation in the disposition; Balf. Pract. p. 318. C. 5. See Drummond against Stewart, *voce* WARRANDICE.

“The Lords found, that Mrs. Drummond could not be obliged to enter with the superior; and, therefore, assoilzied her from the action, and found expenses due.”

*Act. Solicitor Dundas.*

*Alt. Macqueen.*

G. F.

*Fac. Coll. No. 85. p. 335.*