

No 60.

person. The sole reason of disposing them to the son and the other heirs mentioned in the contract, in fee, was to save the expense of making up titles, in the event of their succeeding to them on the husband's death. Although, therefore, the estate came by the mother, it was the father and his representatives who became bound for the L. 2000. Nor was this provision more onerous than other provisions in marriage-contracts; the estate was conveyed to the husband *nomine dotis*, and was the consideration for this and all the other obligations he undertook. The contract created no real burden on the estate in favour of the son, nor consequently any limitation of the father's right under it; the obligation in favour of the son was therefore personal; and, like other obligations in marriage-contracts, not exigible, till after the father's death, ineffectual in a competition with creditors; Ersk. b. 3. tit. 8. § 38.; 1st July 1754, Creditors of Strachan against Strachan, No 105. p. 996.

THE LORDS unanimously repelled the objection.

A reclaiming petition, praying that both objections should be sustained, was refused, 16th December 1794, without answers. See PROVISION TO HEIRS AND CHILDREN.

Lord Ordinary, *Dunsinnan*. For the Common Agent, *Geo. Ferguson, M. Ross*.  
Alt. *Rolland, J. W. Murray*. Clerk, *Pringle*.

R. D.

*Fol. Dic. v. 4. p. 146. Fac. Col. No 132. p. 302.*

No 61.

A declarator of non-entry, raised against the heir of the vassal last infest, may, upon the death of the defender, before decree, be transferred against the succeeding heir.

1795. June 13. The Earl of DUMFRIES against DOUGAL JOHN CAMPBELL.

THE Earl of Dumfries, as superior of the lands of Skerrington, and others, brought an action of declarator of non-entry against Eleonora Campbell, who possessed these lands in apparency, under a strict entail executed by her father, John Campbell, the vassal last infest.

The summons stated, 'That these lands are in the pursuer's hands, by reason of non-entry, since the death of the said John Campbell, and will continue so until the entry of the said Eleonora Campbell.' And it concluded, that this should be declared by the Court, that she should be ordained to enter, and pay to the pursuer the non-entry duties in time past, and a year's rent for her entry; and that it should be declared, that the pursuer has right to levy the rents of the present year, and in time coming, until the entry of the vassal.

Before decree was obtained, the process was allowed to sleep.

Eleonora Campbell having died, the Earl of Dumfries brought an action of wakening and transference against her son Dougal John Campbell, the next heir of entail in the lands, 'as heir served and retoured to his said mother and others, his predecessors in the said lands, or as otherwise representing them in one or other of the passive titles known in law, to the effect, that the pursuer may have such action and execution against him, as he would have had against the said deceased Eleonora Campbell during her lifetime, or as he might have had were she still in life.'

THE LORD ORDINARY wakened and transferred \* *in statu quo.*\*

In a reclaiming petition, it was

*Pleaded*; The defender in no respect represents his mother. He makes up his titles to the lands in question as heir of entail to his grandfather; but the object of an action of transference, is to make the defender personally liable for the conclusions of the original summons; it is therefore competent only (as indeed appears from the uniform style of the libel), where the conclusions of the original summons are applicable against the defender, and where he represents the deceased. But the conclusions of a summons of non-entry are so strictly personal to the original defender, that they cannot be transferred against his heir. Like charges given to an heir to enter, with summonses of adjudication led upon them before decree, they fall to the ground upon the death of the person against whom they are directed.

*Answered*; By the old law, the superior was entitled to resume possession of the lands upon the death of the vassal; and that, not as a penalty against the heir, but in virtue of his radical right in the lands. This idea is still kept up in the style of a summons of a non-entry. The action proceeds rather against the lands than the heir of the vassal, who is made a party only to give him an opportunity of redeeming them.

Declaratory actions, in general, may proceed against the heir, without evidence of his having incurred a passive title, or giving him a charge to enter; Stair, B. 4. T. 5. p. 589.; Ersk B. 4. T. I. § 46. And this is quite established as to actions of transference, in which all defences, both against the passive titles, and the conclusions of the principal actions, are reserved entire; Stair, B. 4. T. 34. § 1. 2.; Bank. B. 4. T. 24. § 64.; Ersk. B. 4. T. I. § 60.

THE LORDS, upon advising the petition, with the answers, unanimously "adhered."

Lord Ordinary, *Aukerville.* Act. Cha. Ross. Alt. *Honyman.* Clerk, *Home.*  
D. D. Fol. Dic. v. 4. p. 147. Fac. Col. No 175. p. 413.

1795. June 17.

MANSFIELD, RAMSAY, and COMPANY, against SMITH, WRIGHT, and GRAY.

No 62.

WHEN a summons of constitution, and arrestment on it, have been produced as an interest in a multiplepoinding, and an interlocutor has been pronounced, preferring the claimant, within year and day from the execution of the summons, it is not necessary that the summons should be called in Court.

Fol. Dic. v. 4. p. 147. Fac. Col.

\* \* \* This case is No 44. p. 2594. voce COMPENSATION.