

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.