had neither domicile nor property in this country. The Lord Ordinary turned the decree into a libel; against which it was pleaded in a reclaiming petition, That a decree may be turned into a libel where it is defective in point of form, but not where it is fundamentally null. THE LORDS repelled the objection. No 59.

Fol. Dic. v. 4. p. 148. Fac. Col.

*** This case is No 82. p. 2157, *voce* CAUTIONER.

1794. *November* 26.

HORATIUS CANNAN, Common Agent in the Ranking of POLQUHAIRN, *against* JOHN GREIG, Trustee for ALEXANDER CRAWFURD.

No 60.
The Court can dispense with the second diet in a summons of constitution on the passive titles, where the pursuer restricts his demand to a decree *cognitionis causa*.

BY a post-nuptial contract of marriage between the late Adam Crawfurd Newall and Marion Cunningham, co-heiress of the estate of Polquhairn, Mr Crawford settled certain provisions on the children of the marriage, payable at their marriage or majority.

Mrs Crawford, on the other hand, disponed her half of Polquhairn to her husband in liferent, and to their son Alexander Crawfurd in fee; whom failing, to her other children of that or any future marriage, in their order.

It was declared, however, that "notwithstanding the liferent of the said lands, in case of the subsistence of heirs of my body, is only given to the said Adam Crawfurd Newall, yet I do hereby grant full power to him, if he shall see cause, not only to sell, dispone, and alienate the said lands, &c. but also to contract debt, and burden the same therewith, at his pleasure, as amply, and in every respect, in the same manner as if he was the unrestrained fiar thereof; on condition always, that he shall, upon his so doing, provide and grant bond, or other sufficient security, to the said Alexander Crawford, my son, or, failing him, to the heir procreated of my body, for the time being, (if any such be) for the sum of L. 2000 Sterling, as a provision to him, payable at the first term of Whitsunday or Martinmas after the decease of my said husband."

Mr Crawfurd Newall stood previously infeft in the whole lands, as trustee for his wife and sister-in-law; but he had, before the date of the contract, acquired the absolute property of the half which belonged to the latter, and his wife, by a subsequent clause in it, discharged the trust, in so far as respected her half.

Mr Crawfurd Newall afterwards contracted debt beyond the value of the estates; and not having granted a bond to his son for the L. 2000, in terms of the contract, the latter obtained a decree of declarator, finding, that notwithstanding the bond had not been granted, he was an onerous creditor of his father to that amount.

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The father died soon after, leaving his affairs in disorder.

The son, in order to render his decree effectual, assigned it and all interest he had in the marriage contract, in trust to John Greig, who soon after charged him to enter heir to his father, and raised an action of constitution against him.

During the course of the *inducia* of the summons, Mr Greig, 11th February 1791, gave in a petition, which was intimated to all concerned, stating, that adjudications of the estate of Polquhairn had been obtained on the 25th February 1790, and therefore prayed the Court to dispense with the second diet of the summons, in order that he might be enabled to adjudge within year and day of the first effectual adjudication.

The prayer of the petition was granted, reserving, however, "to the other creditors, and all parties concerned, all objections against the said decree when extracted."

In consequence of this dispensation, the summons was called next day in Court, and Mr Crawfurd having renounced to be heir, a decree *cognitionis causa*, was pronounced on the 16th February, on which an adjudication was soon after obtained.

A ranking and sale of the estate of Polquhairn was afterwards brought, and Mr Greig having claimed to be ranked as trustee for Mr Crawfurd, for the said L. 2000, the common agent objected to his interest, *1mo*, That the Court had no power to dispense with the second diet of the summons of constitution, and that consequently the decree in that action, and of adjudication which followed upon it, were inept;* *2do*, That being a provision to a child, not payable till after the father's death, it was not good against onerous creditors.

Mr Greig, in defence against the first objection,

Pleaded; Prior to the act 1693, c. 12., two separate citations were required, where the pursuer meant to instruct his libel by witnesses, or a reference to oath. A second diet, however, was at no period necessary, where the libel was to be verified by writing; Hope, tit. 1. § 4.; Stair, b. 4. tit. 38. § 30. Now, as the claimant's libel is grounded on the contract of marriage, and the extracted decree of declarator, and as Alexander Crawfurd's written renunciation to be heir was likewise produced when the decree of cognition was obtained, the Court merely dispensed with a step of procedure, which was in fact unnecessary.

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* The Court, on the application of Mr Greig, had also allowed the decree of cognition to be extracted before it was read in the minute-book. The common agent likewise objected to his interest on that account. But this point having occurred in a question with another creditor in the same ranking, where it was more fully discussed, (See Cannan against Corrie, 24th February 1795, *infra*, *h. t.*) it is unnecessary to take further notice of it here.

Answered; The rule, that summonses may proceed on one diet, only applies where the claim is completely fixed on the defender by writing; but a charge to enter heir has not this effect. The very ground of the summons implies an alternative to the defender, either to be liable or not, as he chuses, he is therefore entitled to the fullest notice, in order that he may have time to deliberate; and by his renouncing, the pursuer, in this case, has completely failed in verifying his libel by writing. What he there concluded for was, that the heir should be found personally liable, whereas, what he obtained was a decree *cognitionis causa*, which, so far from being founded on any written evidence referred to in the libel, proceeded on the renunciation, which did not exist till the action came into Court; 17th July 1702, Biggar against Wallaces, No 125. p. 3775. No 60.

Replied; Were the pursuer to insist on a decree against the heir, personally, a second diet would no doubt be necessary, but not where he limits his demand to a decree of cognition; because, in this last case, he needs to bring no proof of the passive titles. All that is required of him is to verify the debt, by producing the writings by which it is constituted.

Besides, as the *induciæ* are introduced solely for the benefit of the defender, he is not obliged to wait their expiration. As Alexander Crawfurd might have sisted himself in Court, as soon as a summons was raised against him, *a fortiore* was he entitled to appear and renounce after the lapse of the first diet.

Observed on the Bench; The Court did right in dispensing with the second diet, as here both the debt and the renunciation of the heir was instructed *scripto*. In actions on the passive titles, however, where either the debt is not instructed by writing, or where the pursuer means to insist against the heir personally, such dispensation would be incompetent. Neither would a defender, in cases where there is a competition among creditors, be allowed to appear, until both diets of citation had run, because it would put it in his power to give an improper preference to one creditor over another.

The Court unanimously repelled the objection.

Mr Greig, against the second objection,

Pleaded; The granting the provision claimed was the express condition on which the father obtained from his wife the power of selling her estate, or burdening it with debt. The creditors are therefore not entitled to oppose its being fulfilled. Nor can it derogate from the son's right, as creditor to his father, that this sum was not to be paid till his father's death; for as by the contract the latter was to have the liferent of the lands, it followed, that he should have the liferent of the sum which was reserved to the son out of them, in case he should be deprived of the fee.

Answered; The substantial fee of the lands was, by the marriage contract, given to the husband, both in consequence of the power which it gave him of selling and burdening the lands, and of the discharging of the trust then in his

No 60.

person. The sole reason of disponing 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 infeft, 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 possed these lands in apparency, under a strict entail executed by her father, John Campbell, the vassal last infeft.

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.'