

Alexander, his son, were called, certification was granted *contra non producta*, in July last, conditionally, that what they should produce before the 10th of this instant, should be received; after which diet, an extract of the certification being craved, it was alleged for the son, That he being only cited to produce such writs as he had of the said lands libelled, or which his author had, to whom he was a singular successor, certification could only be extracted as to these writs; but as to any other writs he had from his predecessors, to which he had right *jure sanguinis*, the certification being granted against his father, who before the extracting was dead, the process should be transferred *in statu quo* against the said Alexander, his son. This allegiance was repelled, and the Lords found there was no necessity for transferring, because the son was called *ab initio*, and the certification was given against the father only. They assigned a long day, in respect that his father was but lately dead, and in the meantime discharged the extracting of the certification.

Gosford MS. p. 19.

1676. January 7. DAGLEISH against The LAIRD of DUNTREATH.

The deceased Sir James Edmonston of Duntreath, and William Edmonston, his son, became obliged to pay 6000 merks to Mr. John Edmonston, son to Sir James; whereupon Jean Edmonston, as having right from Mr. John, her father, pursued Duntreath, as representing his goodsir, and he having died *pendente lite*, there is a transference of that process pursued by Anna Dalgleish, as heiress and executrix to the said Jean Edmonston, her mother, against Duntreath, as son and apparent heir to Archibald Edmonston, his father, who was son and heir to the said William Edmonston, party obliged with his father; and the process being thereupon transferred, the said Anna insisted in the principal cause, and a term was assigned to prove the passive titles; against the extracting of which act, it is now alleged for Duntreath, No process in the principal cause, upon the transference, because the principal cause is libelled against Archibald Edmonston, who is brother to Duntreath, and not against Duntreath himself, whose name is William; *2do*, In the transference there is a new member libelled against Archibald, the second brother, "as he who received the disposition from his father, with the burden of his debt;" which form allows not to be accumulated in one process with a transference, which is wholly heterogeneous. It was answered for the pursuer, as to the *first*, That albeit, by mistake, he be named Archibald, yet an erroneous designation hath no effect, *ubi constat de persona*; for the christened name was not necessary to be expressed; but if it had been "—— Edmonston, son and apparent heir to Duntreath;" it would have been sufficient; and here William is designed "eldest son and apparent heir to Duntreath. As to the *second*, There is no inconsistency in a transference against the apparent heir, to adject a conclusion of payment against the second brother, as undertaker of the debt.

The Lords repelled the first defence upon the wrong name, the pursuer abiding by the executions, as truly given to the eldest son; and repelled the second

No. 19.

ed in an im-
probation,
whereon cer-
tification was
granted, but
before ex-
tracting the
father deceas-
ed. No ne-
cessity for
transferring
against the
son.

No. 20.

In a transfe-
rence, a pas-
sive title li-
belled, which
was not in the
former pro-
cess, was sus-
tained.

No. 20. defence, the matter being for payment of the same debt, upon a several passive title.

Stair, v. 2. p. 93.

1676. *January 20.* GORDON *against* LORD DUFFUS.

No. 21.
Transference was found to need no new enrolment, but to proceed with the principal cause as it was enrolled.

Mr. George Gordon having pursued the late Lord Duffus, he insists now in a transference against the now Lord Duffus, as heir to his father, and produces his retour. It was alleged for the Lord Duffus, No process in the transference, until it be enrolled and discussed, according to the book of enrolment. It was answered, That transference in wakening being but incident and accessory process, need not of new to be enrolled, but proceed with the principal cause, as it was enrolled before, which is ordinarily practised in wakenings; and the same reason is for transference, where the passive title is instantly verified.

The Lords sustained the allegiance, and found the process to proceed according to the enrolment in the principal cause, without a new enrolment of the transference.

Stair, v. 2. p. 403.

1676. *February 16.*
EARL of DUMFERMLING *against* The EARL of CALLENDER.

No. 22.
A father and his eldest son, who had right to an estate, under burden of debts, were called in a declaration, that the estate should be liable for a certain obligation. The father died. No necessity of transference against the father's representatives, altho' the son was a singular successor.

The Earl of Dumfermling, having right, by assignation, to the obligations contained in the contract of marriage betwixt the deceased Earl of Callender and his grandmother, in so far as the same is in favours of the Lady, pursued the said Earl of Callender for implement of the said obligations; and the Lord Almond, now Earl of Callender, as having got a right to the said Earl of Callender's estate, with the burden of his debts; and the said Earl in the *interim* having deceased; did insist against this Earl of Callender; for whom it was alleged, That the process ought to be transferred against some representing the said Earl of Callender, as heir of line, or otherwise; and though the pursuer's procurators declared they insisted only against Callender for a declarator, that the estate disposed to him should be affected with the foresaid obligation, it was urged for Callender, That the said Earl's heirs ought to be called, seeing the declarator against him, being a singular successor, that his lands should be affected, was only a subsidiary conclusion, and could not be sustained before the debt was constituted; and the debt could not be constituted, unless the pretended debtor, or some representing him, were called—

The Lords, notwithstanding, found process; and that there were no necessity of calling or transferring against the heirs of the debtor.

Act. *Sinclair, Bernie, &c.*

Alt. *Lockhart.*

Clerk, *Monro.*

In presentia.

Dirleton, No. 337. p. 161.