

in litem. Replied, THE LORDS always reserve a power to tax and modify such oaths, when immoderate, so the defender is in no hazard. THE LORDS thought there could be no oath *in litem* in this case; seeing all his loss and damage was to be made up to him, the cause not having been litiscontestate with the defunct.

No 27.

Fountainball, v. 2. p. 657.

1712. February 7.

Mr JAMES STUART of Carswell Advocate *against* The EARL of BUTE.

MR JAMES STUART having pursued the deceased James Earl of Bute, as representing Sir Dougal Stuart of Kirkcoun, Sheriff of Bute, his father, for payment of a debt owing by him to the pursuer's predecessor; the pursuer amended the title of his libel, after the passive titles were by a signed interlocutor of the Ordinary admitted to probation. The defender having died before any act of litiscontestation was extracted, the pursuer craved the process might be transferred against this Earl of Bute, as heir to the last Earl his father, who represented the grandfather by behaviour as heir to him, or vitious intromission with his effects.

Alleged for the defender: Those penal passive titles cannot be transferred against him, as heir to his father; because the action was not litiscontestate in his father's lifetime, by extracting an act of litiscontestation upon the foresaid signature, Stair, Lib. 4. Tit. 39. For so long as nothing was extracted, the defunct might have been reponed against the interlocutor. Yea, it was tacitly past from and opened, by the pursuer's amending his libel after pronouncing thereof.

Answered for the pursuer: *Lis erat contestata cum defuncto* by the signed interlocutor. For by the civil law, a simple repeating the libel, and tabling the defence, made litiscontestation. Besides, there are many courts where no acts use to be extracted, but simple interlocutors have the effect of litiscontestation, for examining parties and witnesses, and circumducing the term. Nay, even in the Session, the main design of extracting acts, is in order to compt with the clerks for their dues; seeing extracted interlocutors are frequently helped, and parties reponed against them summarily, upon new application.

THE LORDS found, There is not such a litiscontestation in the process, as to preclude the defender from proponing this defence, that the action being penal cannot be transmitted against him as heir to his father; especially seeing the pursuer hath amended his libel, since pronouncing the interlocutor upon which he founds the litiscontestation.

Fol. Dic. v. 2. p. 75. Forbes, p. 584.

No 28.

A pursuer on the passive titles having amended the title of his libel, after a signed interlocutor in the process, admitting the passive titles to probation, the said interlocutor was not found to be such a litiscontestation as could transfer the action against the defender's heir as to the penal conclusion of the passive titles.

No 28.

* * * Fountainhall reports this case:

1712. February 8.—By contract past in 1666, betwixt Sir Dougal Stewart Sheriff of Bute, and Ninian Ballantyne of Kaims on the one part, and Isabel Wallace and Stewart on the other, the said Sir Dougal binds and obliges himself to pay to the said Isabel and her son, the sum of 2520 merks, in regard they had disposed to him a right they had on the Laird of Lamont's estate. Isabel and her son being both dead, Mr James Stewart of Creswell advocate, serves himself heir to Alexander Stewart, her son, and thereon raises a process against the last Earl of Bute, on the passive titles, as representing Sir Dougal his father, for payment of the foresaid sum; and the same coming in to be called before the deceased Lord Anstruther in 1696, there was an act finding it relevant to prove the passive titles, and likewise allowing the Earl to prove his defences for eliding and taking them off; but the contract, the ground of the pursuit, miscarrying, Mr Stewart was forced to raise a proving of the tenor, in which, on a notorial copy, and other adminicles, he prevailed; and after extracting his decret of tenor, he insisted in a transference of the old process against the Earl of Bute; and having obtained it transferred, he then craved out the extract of his act of litiscontestation, that he might prove the last Earl represented Sir Dougal his father, on the passive titles of behaviour and vitious intromission. *Alleged* for the Earl, No process at your instance, because you have no sufficient title, in so far as you libel your right as heir to Alexander, and that Alexander was heir to Robert his elder brother, and yet you have produced neither service nor retour to instruct Alexander's being heir to Robert; *2do*, Albeit, you could insist against the deceased Earl, as vitious intromitter, yet he being now dead, that penal passive title cannot be now proved against the defender, his heir, because sapit naturam delicti, and by the rule of law, actiones pœnales non transeunt in hæredes. *Answered* for the pursuer, He acknowledges through misinformation he had libelled wrong, believing the sum was provided to Robert, and that Alexander was served heir to him; whereas after trial he found the money was Alexander's, and that he subscribes the contract with his mother, and though he be designed in the body of the writ Stewart, and at the foot signs only A. Stewart by the initial letter of his name; yet it is evident he is the man to whom the money belongs, and consequently my service to Alexander carries the right; and the adjecting Robert's name was a mere error and a mistake, and as superfluous is delete; and that a pursuer may mend his libel is agreed on by all lawyers; and the learned Voet, ad tit. De edendo, is very distinct on it; he says divinitatis potius quam mortalitatis est nuspian errare, and therefore humanum visum est actori in hac parte erranti succurrere, data ei licentia libelli perperam ab initio concepti emendandi mutandique; and that this may be done not only ante litem contestatam sed etiam post usque ad sententiam, manente eodem iudicio, even though

though the error were in parte substantiali, as in re vel causa petendi; whereas this alteration is in a point nowadays material. As to the *second*, It was answered that penal actions do not go against the heir; but it had a clear exception nisi lis fuerit contestata cum defuncto; but here there is an interlocutor determining the relevancy in your father's lifetime, which makes it transire in hæredes. It is true, the Roman litiscontestation differs from ours; for there the naked repeating the libel and the defender's appearance made litiscontestation, conform to the etymon of the words; but with us it is a judicial act of the process for proving points determined by the Judge to be relevant; as Stair defines it, B. 4. T. 39. and of this kind is my Lord Anstruther's signed interlocutor. Replied, Though some doctors give a power *emendandi libelli*, yet generally they agree this must be before litiscontestation; for after that, it becomes a common process, which cannot be altered without mutual consent; and the defect being in your title, you cannot alter without passing from what was done in the cause before; and if you be loose and free, I must be so too; neither does a single interlocutor bind a litiscontestation on me, unless it had been extracted; for till then it was open both to my father and me to have reclaimed, and been further heard, as now I do, and plead that you having laid your process wrong, so as you are now forced to amend it, I am likewise reponed to say, what law now *ex post facto* affords me, that after my father's death, you can prove no gestion nor vitious intromission to infer an universal passive title, but only to make me liable *in valorem*, of what you shall prove; seeing ye have loosed your own act of litiscontestation by mending your libel and never extracting it. THE LORDS, by plurality, found, that having altered his summons, the interlocutor did not bind the penal passive title libelled against the last Earl, so as to militate now against his heir. This was decided *me referente*.

Fountainball, v. 2. p. 719.

1717. June 5. FORBES of Thornton *against* FORBES of Tolquhon.

FORBES of Thornton having pursued Sir Alexander Forbes of Tolquhon, as representing Walter Forbes his father, for payment of 1000 merks, contained in his father's bond, *in anno* 1651, with annualrent, upon the passive titles; which being sustained, and a probation led, and the process transferred against William Forbes now of Tolquhon, as representing Sir Alexander his uncle:

“THE LORDS found the passive title of Sir Alexander's representing his father the debtor proved; and found, that an act of litiscontestation being extracted against Sir Alexander, and the passive title of vitious intromission proved, the same is sufficient to make the heirs and representatives of Sir Alexander liable *in solidum; reo absente*.

Fol. Dic. v. 2. p. 74. Dalrymple, No 172. p. 238.

No 28.

No 29.

Vituous intromission *transit in hæredes post litem-contestatem.*