

cleugh before them, and taken precognition of the fact, and examined witnesses on both sides, it seemed evidently proven, That Newtoun's imprisonment was occasioned by Gilkerscleugh's delating and giving a subscribed information against him, with a condescence on the witnesses to prove; and that he offered some of them money to depone against him, and had threatened to prosecute him to the gallows. On which, the committee gave their opinion, that he ought to refund Newtoun his damages, which they restricted to 3,500 merks, though it was more than the double of that sum.

But the Parliament rising, they remitted the cognoscing it to the Lords of Session; and, during the dependence there, Gilkerscleugh dies, and Newtoun transfers his complaint against his son: for whom it was ALLEGED,—1mo. That this action, being penal, was odious and unfavourable *quoad* the heir of the delinquent, who was innocent, and represented his father in his estate and heritage, but not in his crimes; seeing *delicta suos tantum tenent authores*, and do not transmit to heirs; for *noxa caput sequitur*, *sec. 1. Institut. de perpet. et tempor. act. ex maleficiis provenientes actiones in rei hæredem non competunt*, as *furti, vi bonorum raptorum, injuriarum*, (of which kind this is, being *injuria verbis concepta*;) and therefore it died with its author, and cannot be insisted in against his heir.

ANSWERED,—That this action was not merely penal, but likewise *rei persecutoria*, being for making up his damages, arising by your falsely accusing one of treason. 2do. It is *certissima juris regula*, that even penal actions, if litiscontested against the committer in his own lifetime, *transeunt in hæredes*; because litiscontestation is a judicial transaction, contract, and novation, which perpetuates the action: And here there was a full and plain litiscontestation; for, not only is there a probation led before answer, but likewise defences proponed for Gilkerscleugh, viz.: That he was forced, by those in the power and government at that time, to give information against Newtoun; so it was no voluntary act.

ANSWERED,—That what passed in private conversation betwixt Newtoun and him could never arise in judgment against him, had he not maliciously discovered it: for there were no witnesses present to divulge, or bring him in hazard of concealing treason; so that the affair in his own lifetime wanted nothing but the Lords' authority and approbation of the report to finish it by a decret.

REPLIED,—All that was done by the commission, was, by way of summary inquiry and precognition, which never amounts to a litiscontesting; for that requires the discussing of the relevancy: for which, see *l. unica Cod. de Litiscontestat.*; though with them it was much less than with us.

The Lords shunned directly to find it was litiscontested in Gilkerscleugh's lifetime, but did the equivalent, by finding this action did not terminate by his death, but was transmissible and competent against his heirs; reserving all defences his father could have proponed, as accords of the law.

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1710. February 25. DANIEL REID, Petitioner.

DANIEL Reid, late servant to Sir William Bruce, presents a tailye of the lands

and barony of Arnot, (which he had right to by adjudications to the value,) made in favours of his son, and other heirs of tailyie therein mentioned. The Lords demurred to order its registration, it not being offered by the heirs of tailyie, or any having interest therein: And remembered what difficulty they had about Ker of Cavers's tailyie being opposed by his son; and, here, Sir John Bruce of Kinross, and the other heirs of tailyie, did not concur, shunning to be tied up with irritant clauses. Mr Reid offered to prove, by famous witnesses present, that his master, some days before his death, put the tailyie in his hands, and ordered him to give it in to the register; and not to be delivered to any till then.

The Lords thought, if Sir William had given him a mandate in writ, they might have proceeded; or, if any remote branch of the tailyie, though not the immediate nearest, craved it, they might have an interest so to do: but, Mr Reid only founding on a verbal warrant, they laid it aside till June.

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1710. *February 25.* The EARL of ABOYNE and Mr JOHN GORDON *against* Mrs LYON of MUIRESK.

AN appeal was given in by the Earl of Aboyne, and Mr John Gordon, his uncle and tutor, against Mrs Lyon, relict of Lyon of Muirensk, and John Riddoch, her assignee. It was a pursuit on a minute of contract, whereby Muirensk, *in anno* 1667, disposed his lands to my Lord Aboyne, and 8000 merks was yet resting of the price; against which, many defences were proponed, That he never attained the possession by that disposition, but was forced to transact with the Duke of Gordon, the Laird of Echt, and others, who had preferable rights; and they being repelled, he appealed.

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1710. *February 28.* SCOT of RAEBURN *against* WALTER SCOT of HALLCHESTER.

A CONTEST arose about the succession to Sir William and Robert Scots of Harden. Scot of Raeburn, as being nearest heir of tailyie, by an old bond of tailyie, takes out brieves from the Chancery for serving himself to them. Walter Scot of Hallchester, as nearest heir of entail, by a posterior tailyie, takes out brieves likewise: And, each of them raising mutual advocations, it was *CONTENDED* for Hallchester against Raeburn, that he could never serve heir on that tailyie; because not only was it revoked, altered, and recalled by a subsequent tailyie in his favours, but likewise, there was a decret of certification in an improbation obtained against it, at the instance of the very makers of the tailyie; so you cannot serve upon a *non ens*.

ANSWERED,—The first tailyie had no clause giving a power or faculty to alter, and so could not be revoked. And, for the certification, I was not then *in rerum natura*: Neither is my father called; and so *res inter alios acta nec mihi nocet nec tibi prodesse debet*: Besides many nullities I can object to that decret.

The Lords found, so long as the certification stood unreduced, Raeburn could