1751. *January* 22. HEPBURN of Kingston *against* MACLACHLAN.

No 33.
The heir is liable for repetition of money spuilzied by his predecessor.

An assignation to a sum seized by rebels though conceived in terms as if it had voluntarily been lent, was not sustained to invalidate a proof of its being forcibly taken.

LACHLAN MACLACHLAN of that Ilk, and Charles Stewart of Ardshiel, being both engaged in the late rebellion, were sent into East Lothian after the battle of Preston, to levy the cess of that county, where they came to the house of Hepburn of Kingston, and took from him about L. 700 Sterling; which Maclauchlan, when they came to their quarters, took care to see counted over before notaries, whereby the sum was ascertained; and promised to a gentleman, a friend of Kingston's, who was paying his own cess, to send to him, for Kingston's use, as he said, the Prince's bond; accordingly the gentleman deponed he did send him a sealed writing, signed, Charles, P. R. importing the receipt of the money, by the person assuming that character, by the hand of Colonel Maclachlan; and an order on his treasurer to pay it, on the success of his designs. Maclachlan's concern in this affair, in so far as above set forth, was owned to be proved, *et quod contrectaverit pecuniam*; but it was alleged the command was in Ardshiel, and that he was only an accessory in the spuilzie; which was not allowed on the other side to be proved, but this did not much affect the cause.

Patrick Scot Hepburn, as executor to Kingston, pursued Robert Maclachlan of that Ilk, as representing Lachlan his father, now dead, for restitution.

Pleaded in defence, Penal actions arising from delicts, cannot be insisted on against an heir; and though the pursuer be seeking only reparation of his damages, yet as no part of this money was converted to the spuilzier's use, but taken for, and applied to the maintenance of the cause wherein he was engaged, the action is, with regard to the defender, penal, arising from the delict of his predecessor: It not just that children should be punished for the faults of their parents, Grotius, l. 2. tit. 21. § 13, nor consequently heirs for those of their predecessors, § 19. and 20. dict. tit. L. 20. D. De pœnis, Si pœna alicui irrogatur, receptum est commentitio jure ne ad hæredes transeat. It is laid down, § 1. Inst. De per. et temp. act. pœnales actiones in hæredem rei non competere; and to the same purpose, l. 28. D. De reg. juris, where it is settled how far he is liable, viz. quod non debet lucrum facere, si quid ex ea re ad eum pervenerit; and this rule is received by us; for it was found, 17th January 1711, Lady Ormiston against Hamilton, No 26. p. 10343. that a defender could not avail himself of a counter claim, arising from a delict of the pursuer's predecessor; also upon the rescission, by act 4th Parl. 1. W. and M. of the forfeiture of the Earl of Argyle, pronounced 23d December 1681, to the scandal and reproach of the justice of the nation, as the act expresses it, the Earl having applied to the Parliament for reparation, could not obtain it against the heirs of his judges.

Pleaded for the pursuer, The citation from Grotius does not apply to the question, how far heirs are liable for their predecessors' debts; to make them

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so, is not punishing them, but taking out of the estate of their predecessor, reparation for the wrong he had done; whereby they lose nothing, but receive so much less a succession; by the civil law penal actions are not competent; but that action is not penal, whereby nothing is sought but reparation of damages; such actions *dantur in heredem*, though the delict may not have enriched the delinquent or his heir; particularly, which applies directly to the present case, the conditio furtiva, l. 7. § 2. D. eo titulo, l. 6. § 4. D. De act. rer. amot. § ult. Inst. De obl. ex delicto, § 9. Inst. De lege Aquilia, Vinnius ad tit. Inst. De perp. et temp. act.

Replied, It appears from several cases, that the action is not given in the civil law against heirs, *nisi aliquid pervenerit ad eos*, though the claim was for reparation of damages; so that the proper distinction is of actions *ex delicto*, *et ex contractu*, though some of the texts mentioning *actiones pœnales*, have given ground to the Doctors of distinguishing them into pœnales ex parte actoris, et ex parte rei tantum, l. 3. § 5. D. Si mensor falsum modum dixerit, l. 9. § 1. D. Quod falso tutore, in which the reason is given, quia hæ actiones in dolum concipiuntur; the *condictio furtiva* is singular in this repect, and there is no arguing from it to action *ex delicto* for reparation in general; and even it Cujacius, 7mo libro obs. tit. 7. is of opinion to be only given in hæredem in quantum ad eum pervenit, arguing from the actio rerum amotarum, of which this is expressly said, l. 3. C. eo tit. which is the general rule, tit. C. Ex delictis defunctorum: Supposing the present case a theft, Maclachlan was not principally guilty; and the condictio furtiva is not given against his heir, cujus ope et consilio furtum factum est, l. 6. D. eo titulo; but this was not theft, being not committed lucri faciendi animo, but applied for the support of their cause, as appears by the Pretender's bond produced by the pursuer. The action for wrongous intromission, when the penal consequences of spuilzie are not due, is not against several intromitters *in solidum*, but *pro rata*, 17th January 1668 Strachan against Morison, *voce* SOLIDUM ET PRO RATA; and this action, against an heir resolves into an action of wrongous intromission.

Duplied, Supposing the civil law did not give actions *ex delicto* against an heir, the decision would not fall to be regulated thereby, the contrary obtaining by modern practice, Voet. l. 27. t. 7. § 6. and the authorities there cited; by the civil law the *condictio furtiva* lies against the heir, and here was a plain theft, in which Maclachlan was a principal; there is no difference whether he took the money directly for his own gain, or to apply it to any other purpose; his taking it to serve his purpose, satisfies the definition of its being done *lucri faciendi causa*; though there is no proof that his estate, which his heir possesses, was not thereby encreased; for the bond is not a proof of the application; there is not any decision that wrongous intromitters are not liable *in solidum*, unless where they are all in the field and solvent; there the action may be divided, reserving still to attack any for what shall not be recovered from the rest.

" THE LORDS repelled the defences, and found the defender liable in the principal sum, interest, and expense of process." No 33.

Act. *R. Dundas, Lockhart et A. Pringle.* Alt. *R. Craigie, Ferguson, T. Hay et J. Grant.* Clerk, *Murray.*

1751. *December* 6.—PATRICK SCOT-HEPBURN as executor decerned to Patrick Hepburn of Kingston his uncle, pursued Robert Maclachlan of that ilk, and obtained the interlocutor observed 22d January 1751, on which he extracted decreet, and pursued adjudication of Maclachlan's estate.

Objected to the adjudication, The decreet is extracted without title to support it, the sum not being confirmed.

The pursuer produced a special assignation to the debt, in these terms, " I Patrick Hepburn of Kingston in the county of Haddington, Esq; for the love, favour, and affection I have, and bear to Patrick Scot, eldest lawful son to George Scot, writer in Edinburgh, my nephew, do hereby make, nominate, and appoint the said Patrick Scot, his heirs and assignees whatsoever, my undoubted and irrevocable cessioners and assignees, in and to the sum of L. 740 Sterling of money of Great Britain, agreed upon to be levied by Colonels Maclachlan of Maclachlan, Esq; and Stewart of Ardshiell, for behoof of his Royal Highness Charles Prince of Wales, &c. regent of the kingdoms of Scotland, England, France and Ireland, and the dominions thereunto belonging, in virtue of a Royal warrant issued by his Highness for that effect; substituting hereby the said Patrick Scot, and his said heirs or assignees, in my full right and place of the sums thereby levied; willing hereby and requiring the said George Scot, father and administrator in law for his said son, to call for and require payment of the said sum so levied; acquittances, receipts and discharges to grant upon payment; and generally every other act or deed thereanent to do, that I might have done at or preceding the granting of these presents."

THE LORD ORDINARY, 21st November 1751, " Sustained the objection to the decreet, that the same was extracted without confirmation."

The defender reclaimed against the interlocutor finding him liable, as the decreet was now recalled, and he ought to be further heard, notwithstanding the reclaiming days were run, founding on this new writ produced by the pursuer, of which he was ignorant, and which shewed the money was not extorted, but voluntarily lent, under the appearance of force, for the support of the Pretender's cause; it bore that the money was agreed to be levied by a Royal warrant; gave to the Pretender the titles he assumed; and empowered the assignee to receive the money, but made no mention of diligence; and was of the same date with the obligation assigned, which was not delivered for some time after, so that it was expected, which shewed an agreement; and it was proved Kingston expressed himself, that he hoped the Prince would not let him be a loser; and he expected to get his money out of the Exchequer.

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Pleaded for the pursuer, The assignation is no evidence of consent; it does not assign the obligation, but the sum, and must carry all action against every one liable therein; it seems to have been given to entitle George Scot, if possible, to procure restitution from the Pretender's party, who were still in the Abbey, which sufficiently accounts for the style thereof; the proof of the force is clear, and Kingston expected his money out of the Exchequer, out of Maclachlan and Ardshiell's forfeiture.

It was *objected* by some of the Lords, That the assignation being produced to prove the money was not forcibly taken, and thereby to exclude the action; they had so far taken notice of it, as to consider whether it proved the allegeance; yet they could not give so much countenance to this treasonable paper, as to find it conveyed any right, or to found any judgment upon it.

THE LORDS repelled the defence and adhered; but superseded advising as to the title.

N. B. The decision upon the title, which the LORDS at last found ought not to be sustained, does not fall under this collection.

D. Falconer, v. 2. *No* 183. *p.* 222. & *No* 243. *p.* 294.

1752. *July* 17.

MONTGOMERY *against* The REPRESENTATIVES of WALKER.

No 34.
Pœnales actiones transeunt in hæredes ubi lis est contestata.
When *lis* is with us understood to be *contestata* explained.

A PROCESS being brought against Emanuel Walker collector at Port-Glasgow, at the instance of Robert Montgomery, mariner in Lairn in Ireland, of wrongous imprisonment, oppression and damages; Walker, the defender, died, after having proponed several defences *in jure;* and the process being transferred against his Representatives, the Ordinary found them liable in damages and expenses, and appointed them to give in a condescendence thereof.

Against this interlocutor the defenders reclaimed, and, *inter alia, contended,* That this was a penal action *quæ non transit in hæredes.*

When the petition, with the answers, came to be advised, in respect of certain allegeances made for the defenders, the same were remitted to the Ordinary; meantime, it is not amiss to observe, that on this occasion, it was admitted to be a point certain, that even penal actions transmit in hæredes ubi lis fuerit contestata cum defuncto; and that with us *lis* is understood to be *contestata* by an extracted act. Only, where the question is *in jure*, *lis* is understood *contestata cum defuncto*, when the matter has so far proceeded, that the defunct has proponed a defence *in jure.*

Kilkerran, (PERSONAL and TRANSMISSIBLE.) *No* 6. *p.* 401.