No 26.

L. 75. D. de Reg. Jur.: 3*tio*, The executrix cannot have allowance of the extraordinary expense of the funeral; for that, if occasioned by the fact and deed of the apparent heir, can be no more privileged than a debt of the apparent heir, which is not deducible out of the Lord Whitelaw's executry, but only reserved as accords to be pursued by way of action against the defender as heir to his father.

Replied for the pursuer: Can it be in any sense inferred, That the Lady Ormiston was to have been at the charge of her last husband's funeral, from his giving her a considerable addition to the provision in her contract of marriage; and the argument drawn from her paying the furnishers is no better; especially considering, that the payment was not made immediately, but some months after Whitelaw's death, to stop their craving, who grudged to lie out of their money; this any person might have safely done, the executry being sufficient; and the funeral expenses a privileged debt, Kelhead *contra* Irving and Borthwick, *voce* PRIVILEGED DEBT. 2*do*, The L. 14. §. 7. in fin, de Relig, et Sumptib. Fun. requires not that one should always necessarily protest to take away the presumption of expending *donandi animo*, but only adviseth to do it in some dubious cases, *ne postea patiatur quæstionem*.

THE LORDS found, that the pursuer hath no right to retain the extraordinary expense of the funeral in this process, suppose the same were furnished by order of the deceased Bangour, apparent heir to the Lord Whitelaw, in prejudice of the defender, heir served to him *cum beneficio inventarii*, and universal heir to his father.

Forbes, *p.* 478.

1711. *July* 5. JOHN LEWARS *against* DANIEL CARMICHAEL.

No 27.
The defender in a spuilzie and ejection having died after the summons had been called, returned and enrolled but before litiscontestation, and the pursuer having proved the spuilzie after the action was transferred against the defunct's heir, the pursuer was not allowed to

IN the process of spuilzie and ejection at the instance of John Lewars against the Laird of Mauldslie, the defender having died after the summons was called, seen, returned, and enrolled, the pursuer transferred the action against Daniel Carmichael now of Mauldslie, and having proved the spuilzie and ejection, craved to be admitted to depone *in litem* upon his damages.

Answered for the defender; The process of spuilzie not having been litiscontestate against the spuilzier in his lifetime, the pursuer could not be allowed to give his oath *in litem*, which hath a penal consequence against the defender, who is heir to the spuilzier; Tit. Cod. Ex delictis defuncti in quant. hæred. for delicta suos tenent auctores.

Replied for the pursuer; An action of spuilzie and ejection, with all the privileges of an oath *in litem*, and violent profits attending it, is competent not only against the principal offender, but also against his heirs, though *lis* was not *contestata* with the defunct. 1*mo*, Albeit Actio ex delicto pænalis non

transit in hæredes; yet actio ex delicto rei persecutoria for reparation of damage and interest (and such is an action of spuilzie) is always sustained against heirs. So by the civil law, *actio furti*, or the penal action for theft, did not descend against the heir; but *condictio furtiva* arising from the same delict for damage and interest, did descend against him, § ult. Inst. De oblig. quæ ex delicto; and actio legis aquiliæ transitura fuisset in hæredem, si ultra damnum nunquam lis æstimaretur § 9. Instit. De lege aquilia; which is agreeable to the opinion of lawyers, Vinnii comment. In Instit. De Perpet. et Temp. Act, § 1. in fin. And to our own practicks, L. Renton and Lambertoun, No 13. p. 9394. 2*do*, The pursuer's oath *in litem* is no penalty in the action of spuilzie, but only the legal mean of proving his damages, which is no heavier upon the heir, than it would have been upon his predecessor, with whom he is reckoned in law to be eadem persona, et nemo lucrari debet cum alterius jactura.

No 27. prove his damages by his oath *in litem*, against the heir.

Duplied for the defender; Where the action is rei persecutoria ex parte actoris, and penal ex parte rei, the heir is not liable, L. 26. D. De dolo malo L. 9. § 1. D. Quod falso Tut; and it will not be pretended, that any of the pursuer's goods, or any profit thereby, came to the defender.

THE LORDS found, that the pursuer cannot be allowed to prove his damages by his oath *in litem*, against the defender who is heir to the spuilzier.

Fol. Dic. v. 2. p. 75. Forbes, p. 518.

*** Fountainhall reports this case:

1711. *July* 11.—JOHN LEWARS having been tenant to the deceased Sir Daniel Carmichael of Maulsly, and being in arrears, his master *per aversionem*, intromitted with his whole stacks of corn, stocking and bestial. Lewars raised an ejection and spuilzie against him; but before it came to be debated, Maulsly died, which forced Lewars to transfer the process against Daniel Carmichael, now of Maulsly, a pupil, and his Tutors. *Alleged*, No spuilzie; for his intromission was by virtue of decreets in his own baron-courts, and legal poindings following thereon. *Answered*, I have called for the grounds of these decreets and got certification against them; so the poinding being destitute of any warrant, they can never palliate nor protect against the spuilzie. *Replied*, It is confessed, if Barons decreets be tried in a reduction, by the nice forms and solemnities of other decreets, they cannot stand tight and firm against the usual nullities, the minutes from which these rolments of baron-courts are framed being seldom preserved; yet it were unprecedented to urge their informalities to that extent to infer a spuilzie; it being certain that titles otherways defective and quarrellable may stand good and competent to defend against such penal actions; seeing *quævis causa probabilis excusat a spolio; et quivis titulus coloratus* takes off a delict. But, 2*do*, The plain defence here seems so clear, that it cannot be imagined what can be obtruded thereto; viz. The pupil is pursued for his father's deed, where no litiscontestation was made upon the fact before

No 27.

his father's death, which happened before the cause was debated; and seeing, *nihil ad eum pervenit*, he cannot be answerable for the penal consequences of that deed, though it had been a spuilzie, as it was not; for these penal actions *ex delicto non transeunt in hæredes* unless *quatenus ad eum pervenit, ne ex delicto defunti iniquum lucrum sentiat. l.* 38. *D. De reg. jur. l.* 22. *C. De pœnis.* The law indeed transmits it against the heir, if litiscontestation was made with the defunct who did the fact, because that is a judicial contract, and so *haeres tenetur ex contractu, l.* 139. & 164. *D. de reg. jur. l.* 26., & 58. *D. De obligat. et act.* But it is not so much as pretended there was any litiscontestation made in the defender's father's lifetime; so he is secure against all penal effects, whatever may be said for his restoring the value of the goods intromitted with; but even in that case the debt he owed must be deducted off the first end of the intromission. *Answered*, That it is very true, where the action is *mere penalis ex delicto, non transit in hæredes*, but it is otherways when it is likewise *rei persecutoria* as here. See the case of Renton and Lamerton, 23d February 1667, No 13. p. 9394.; and Hope's Practicks, p. 519. and 522*. And it is enough to infer this action against the heir, that the process was raised, executed, and inrolled before his father's death, which cannot prejudge Lewars the pursuer, for if he had lived, it would have been a clear spuilzie; and why should his heir thereby *lucrari cum meo damno?* and *l.* 33. *D. De obligat. & act.* requires no more but that the action was intended and he convened in judgment: Constitutionibus quibus ostenditur hæredes pœna non teneri, placuit, si vivus conventus fuerit etiam pœnae persecutionem in hæredes transmissam videri quasi lite cum mortuo contestata. *Replied*, This text contradicts the whole tenor of the law on this point; and at best it is only *videri*, which is *nota improprietatis*, and that it was neither *jus certum* nor *incontroversum*: Besides Gothofred says, Haloander thinks there is a negative particle here wanting, and that it should be read *transmissam non videtur*: And truly this agrees better with the imperial constitution, to which the text refers; for Dioclesian and Maximilian, in l. unica, C. Ex delict. defunct. in quantum hæred. teneantur, lay it down pro jure certissimo, that hæredes only tenentur in solidum ubi lis erat contestata, and in other cases, only in quantum ad eos pervenit ne ex alieno scelere ditentur; which seems much to confirm the emendation of the former law. And the LORDS, in the late case of the Earl of Lauderdale's declarator of non-entry against Castlebrand, 13th January 1706, No 39. p. 9325., would not give the full rents from the citation, but only from the litiscontestation and interlocutor. The pursuer then insisted to have his oath *in litem* upon his damages, in so far as he has not proven all the particulars intromitted with. *Answered*, This not being a spuilzie *quoad* the infant, all that can be required of him, is to hold count for the whole subject of his father's intromission to the utmost penny, which he is willing to do; and it were unjust to allow him an extravagant oath

* *See* APPENDIX.

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.

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Fountainhall, v. 2. p. 657.

1712. *February 7.*

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

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.

MR JAMES STUART having pursued the deceased James Earl of Bute, as representing Sir Dougal Stuart of Kirktoun, 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.