

No 35.

There was no extracted sentence, but merely an interlocutor of the Dean of Guild, afterwards brought before this Court by suspension, and which ought more properly to have been an advocation, as the decree never was extracted; and, therefore, the whole matter being still open, the interlocutor of the Dean of Guild makes no difference in the case. It still goes no further than a *lis contestata*.

*Answered*; The distinction the defender endeavours to introduce between penal actions, which are competent to a private party, and those pursued at the instance of the public prosecutor, has no countenance, either from the nature of the thing, or from the authority of lawyers. For, although the claim of a private party may be considered as more favourable, so far as his action insists for reparation of damages actually suffered; yet, when he goes beyond this, and concludes for a penalty, there is not the least reason for making a distinction between the person concerned, and a Procurator-fiscal, or any third party, whom a particular statute may have authorised to prosecute; and, agreeably to this, in the writings of all our lawyers, the rule is laid down in general, that, after *litis-contestation*, penal actions, that is, actions arising *ex delicto*, which contain only conclusions of a pecuniary nature, transmit against the heirs of the defender.

In the present case, the conclusions of the action were merely pecuniary; and, as the defender was not indicted for trial by jury, the strict forms respecting criminal trials did not apply. But, not only was a proof led, but a judgment had been actually pronounced, a considerable time before Mr Paxton died. In a word, from the time that the Dean of Guild pronounced his judgment, imposing the fine of L. 100 Sterling, there was a *jus quæsitum* to the prosecutor, which could not be defeated by the subsequent accident of Paxton's death. This fine came clearly to be of the nature of a civil debt, and, like every other debt of Paxton's, must be made effectual out of his estate.

“THE LORDS find, that the action being purely criminal, the same cannot now proceed against the present defender, the heir of John Paxton; and therefore suspend the letters *simpliciter*, and decern.

Reporter, Lord Justice-Clerk. Act. R. Blair. Alt. Ilay Campbell. Clerk, Campbell.  
Fol. Dic. v. 4. p. 74. Fac. Col. No 59. p. 146.

1775. December 15.

PENMAN against PENMAN.

No 36.

THE passive title of vitious intromission, where the proof had been led after the intromitter's death, was found to transmit against the heir only *in valorem* of the intromission.

\* \* \* This case is No 158. p. 9836. voce PASSIVE TITLE.