

NO. 1. selves had been the donors. The present case is precisely similar to the terce, or to a jointure provided in a contract of marriage. These, no doubt, are alimentary : So are the proprietor's rents of land ; but not in the sense of excluding creditors.

The Court took a middle course ; which was, upon the acquiescence of the creditors, to sustain the arrestments to affect the half only of the annuity.

*Sel. Dec. No. 132. p. 187.*

1776. July 23. ALEXANDER CALDER Pursuer, *against* The RELICT and CHILDREN OF KENNETH MACKENZIE, Defenders.

NO. 2.

Whether an action *ex delicto* be transmissible against the heirs ? Effect of *litiscontestation*. Act before answer. See No. 37. p. 10363.

THE deceased Kenneth Mackenzie having been attacked and wounded in the dark, and a quarrel having subsisted between him and the pursuer, suspicions were entertained of the pursuer having been himself the actor in, or privy to this business. He was accordingly examined, first before the Sheriff of the county, and afterward at Edinburgh, before the Lord Justice-Clerk, but no sufficient proof appearing against him, no further steps were taken.

The pursuer afterward brought an action of oppression and damages against Kenneth Mackenzie, who having died *before any proof had been taken therein*, a transference of the action was raised against his widow and children ; who having insisted that the action being founded on a supposed delict, was not transferable against the heirs of the deceased, the Lord Ordinary, after some procedure, " In respect that *litiscontestation* was made " with the defunct by an extracted act and commission for proving, adhered " to his former interlocutor transferring *in statu quo*."

Pleaded for the defenders : No point is more clear, than that penal actions arising *ex delicto* do not pass against heirs. Nay, even actions *ex delicto*, though *rei persecutoria* only, do not transmit ; 19th January 1711, Lady Ormiston *contra* Hamilton, No. 26. p. 10343. Besides, the present action is not *rei persecutoria* ; for although it bear a conclusion for damages, these are in reality no more than a *solatium* claimed on the footing of an injury, where a pecuniary loss cannot be said to have been incurred, or to be capable of being estimated by any rule whatever. Such damages, therefore, cannot be demanded from heirs, any more than a fine incurred in consequence of a delict, the ground of action dying with the transgressor, and becoming extinct.

With respect to the *ratio decidendi* of the Lord Ordinary's interlocutor, it was indeed a principle in the Roman law, that, *Si lis contestata fuerit cum defuncto*, a penal action should transmit against heirs. This, however, proceeded from litiscontestation, among the Romans, being a species of contract, whereby the nature of an obligation was changed, and what was originally penal, became civil and consensual, so as to be, from the date of the litiscontestation, an obligation *quasi ex contractu*; and accordingly, litiscontestation in that law was performed by uttering a certain form of words which produced the quasi contract.

But there is nothing analogous to this in our law. We have adopted the term litiscontestation, it is true, and we apply it to an act for proving. Yet the effect of this cannot be compared to the effect of litiscontestation, and more particularly, it can have no such effect when the act is only an act before answer. When a special relevancy is determined by an interlocutor before going to proof, this may be considered as a decree on the point of law; and there may be some ground in such a case for considering an obligation to be fixed down upon the defunct, so as to transmit against his representatives. In an act before answer nothing is determined at all; no obligation is created that did not before exist; every defence competent in law may still be proponed; the defender may be assoilzied on objections made to the relevancy after the proof is taken, and even though the libel should be completely proved. The extracting of such an act, therefore, can have no greater effect than any common step of process; and the action cannot be rendered transmissible thereby, nor until a decree be pronounced.

Answered for the pursuers: The action is of a mixed nature, and contains two different conclusions. It is evidently *rei persecutoria*, so far as it demands reparation of the patrimonial damage actually sustained; and it is penal so far as it concludes for damages *in solatium*, on account of the injury done to the pursuer, and for such other censure as the Court should think fit to inflict. The first part of the action is transmissible, though there had been no litiscontestation with the defunct. The second is transmissible on account of the litiscontestation.

It is uniformly held by all our lawyers, that an *actio rei persecutoria*, though arising *ex delicto*, is transmissible against heirs even without litiscontestation; and although the rule in the civil law is, that the action could only be sustained against the heir *in quantum ex ea re pervenit*, yet this limitation has justly been departed from in our practice; Bankt. Vol. 2. p. 608, 609.; Ersk. B. 4. Tit. I. § 14., 22d January 1751, Hepburn *contra* Maclauchlan; No. 33. p. 10357; and the case of Lady Ormiston, quoted by the defenders, appears to have gone upon particular circumstances, and to have been no decision upon the point of law.

NO. 2. As to the effect of litiſcontestation, though we have not the form of the Roman law in that matter, yet we have the *ſubſtance* of it, and give it pre- ciſely the ſame effect, at leaſt in the queſtion of transmission. Accordingly, concluſions of a penal nature, ſuch as damages *in ſolatium*, or violent profits, transmit againſt the heir after litiſcontestation with the predecessor; Ersk. B. 4. Tit. 1. § 70. February 7. 1712, Stewart, No. 28. p. 10351; 28th November 1682, Paip. No. 23. p. 10342; 5th June 1717, Forbes, No. 29. p. 10353; 17th July 1752, Montgomery *contra* The representatives of Walker, No. 34. p. 10360. When parties have joined iſſue in any action of a private nature, concluding for civil conſequences, though penal, each party obtains a *juſ quaſitum* in the conſequences of the action, which cannot be extinguished by the death of either. The caſe is different as to public proſecutions, where the concluſion is for puniſhment *ad vindictam publicam*. A criminal muſt be puniſhed in his own perſon, and his heir cannot be ſubſtituted in his place; ſo it was found in a late caſe, the Procurator Fiſcal of Dean of Guild court of Edinburgh *contra* Paxton. And the ſame muſt hold as to the concluſion of *cenſure* in the purſuer's action. But the other concluſions appear to be undoubtedly competent againſt the defenders.

The Court pronounced an interlocutor, adhering to that of the Lord Ordinary.

Lord Ordinary, *Stonefield*.

Act. *Ilay Campbell*.

Alt. *Crosbie*.

*W.*