

though the error were in parte substantiali, as in re vel causa petendi; whereas this alteration is in a point nowadays material. As to the *second*, It was *answered* that penal actions do not go against the heir; but it had a clear exception nisi lis fuerit contestata cum defuncto; but here there is an interlocutor determining the relevancy in your father's lifetime, which makes it transire in hæredes. It is true, the Roman litiscontestation differs from ours; for there the naked repeating the libel and the defender's appearance made litiscontestation, conform to the etymon of the words; but with us it is a judicial act of the process for proving points determined by the Judge to be relevant; as Stair defines it, B. 4. T. 39. and of this kind is my Lord Anstruther's signed interlocutor. *Replied*, Though some doctors give a power *emendandi libelli*, yet generally they agree this must be before litiscontestation; for after that, it becomes a common process, which cannot be altered without mutual consent; and the defect being in your title, you cannot alter without passing from what was done in the cause before; and if you be loose and free, I must be so too; neither does a single interlocutor bind a litiscontestation on me, unless it had been extracted; for till then it was open both to my father and me to have reclaimed, and been further heard, as now I do, and plead that you having laid your process wrong, so as you are now forced to amend it, I am likewise reponed to say, what law now *ex post facto* affords me, that after my father's death, you can prove no gestion nor vitious intromission to infer an universal passive title, but only to make me liable *in valorem*, of what you shall prove; seeing ye have loosed your own act of litiscontestation by mending your libel and never extracting it. THE LORDS, by plurality, found, that having altered his summons, the interlocutor did not bind the penal passive title libelled against the last Earl, so as to militate now against his heir. This was decided *me referente*.

*Fountainball, v. 2. p. 719.*

1717. June 5.

FORBES of Thornton *against* FORBES of Tolquhon.

FORBES of Thornton having pursued Sir Alexander Forbes of Tolquhon, as representing Walter Forbes his father, for payment of 1000 merks; contained in his father's bond, *in anno* 1651, with annualrent, upon the passive titles; which being sustained, and a probation led, and the process transferred against William Forbes now of Tolquhon, as representing Sir Alexander his uncle:

“THE LORDS found the passive title of Sir Alexander's representing his father the debtor proved; and found, that an act of litiscontestation being extracted against Sir Alexander, and the passive title of vitious intromission proved, the same is sufficient to make the heirs and representatives of Sir Alexander liable *in solidum; reo absente*.

*Fol. Dic. v. 2. p. 74. Dalrymple, No 172. p. 238.*

No 28.

No 29.

Vitious intromission *transit in hæredes post litem-contestatem.*