

1773. February 18.

ROBERT GRAY, Procurator-Fiscal to the Dean of Guild Court of Edinburgh, against JAMES PAXTON and Others, the Representatives of John Paxton, Vintner in Edinburgh.

UPON a complaint to the Dean of Guild of Edinburgh, in name of George Marshall, vintner in Dumfries, James Burges, his servant, and Robert Gray, Procurator-fiscal, against John Paxton, vintner in Edinburgh, on this ground, that Burges having set up some hackney-horses, the property of Marshall, in the defender's stables, he, and his servants, at feeding these horses, used a measure far short of the legal measure, and, that it would come out in evidence, that the defender had used this false measure for some years past, and imposed on the lieges; and therefore concluding for a fine and expenses; the following judgment was pronounced by the Dean of Guild Court: "Find the complaint proven: Fine and amerciate the defender, John Paxton, in L. 100 Sterling, payable to the Procurator-fiscal, for the behoof of the Charity Workhouse of Edinburgh: Grant warrant to the officers of court to poind his goods, or imprison his person within the tolbooth of Edinburgh, till payment of that sum: Find the defender liable in L. 10 Sterling of damages to the private complainer: Find him also liable in full expenses; and decern."

Paxton having brought a suspension of this judgment, the Lord Ordinary took the cause to report, and appointed informations, which were accordingly lodged; subsequent to which, Paxton, the defender, having died, a summons of transference was executed against his son, and having been called in court, the action was transferred *in statu quo*, reserving all objections to the defender.

Objected; The rule in law, that penal actions transmit against the heir, *si lis contestata fuerit cum defuncto*, is only applicable to private actions arising from delinquency, where a certain penalty is defined by the law, and where there is a private party. In the present instance, the action was indeed raised in the name of a private party, viz. George Marshall, inn-keeper in Dumfries; but, from his letter annexed to the information for Mr Paxton, it appears that he disclaimed the action; and his postilion has no interest in it, nor any right to insist for reparation of a damage supposed to have been done to his master: He does not found upon any particular law, giving him a penalty or right of action, in such a case. He was a mere name for his master, who has withdrawn his appearance; and therefore the action is entirely at an end *quoad* the private party. It is only now carried on by the Procurator-fiscal; and, though the conclusion is only for a pecuniary punishment, it does not occur how the heir of a supposed guilty person can be subjected in this punishment, or how the action can now go on, in order that an arbitrary fine may be inflicted against the heir, for a crime of which he never was guilty; and to which fine no private party has any claim, the same being only demanded at the instance of the public.

No 35.

Penal actions not transmissible against heirs, even after liti-constatation, if purely criminal.

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.