

No 33.

*Pleaded* for the pursuer, The assignation is no evidence of consent ; it does not assign the obligation, but the sum, and must carry all action against every one liable therein ; it seems to have been given to entitle George Scot, if possible, to procure restitution from the Pretender's party, who were still in the Abbey, which sufficiently accounts for the style thereof ; the proof of the force is clear, and Kingston expected his money out of the Exchequer, out of Mac-lachlan and Ardshiell's forfeiture.

It was *objected* by some of the Lords, That the assignation being produced to prove the money was not forcibly taken, and thereby to exclude the action ; they had so far taken notice of it, as to consider whether it proved the allegiance ; yet they could not give so much countenance to this treasonable paper, as to find it conveyed any right, or to found any judgment upon it.

THE LORDS repelled the defence and adhered ; but superseded advising as to the title.

N. B. The decision upon the title, which the LORDS at last found ought not to be sustained, does not fall under this collection.

*D. Falconer, v. 2. No 183. p. 222. & No 243. p. 294.*

1752. July 17.

MONTGOMERY against The REPRESENTATIVES of WALKER.

No 34.

*Penales actiones transeunt in hæredes ubi lis est contestata.*

When *lis* is with us understood to be *contestata* explained.

A PROCESS being brought against Emanuel Walker collector at Port-Glasgow, at the instance of Robert Montgomery, mariner in Lairn in Ireland, of wrongous imprisonment, oppression and damages ; Walker, the defender, died, after having proponed several defences *in jure* ; and the process being transferred against his Representatives, the Ordinary found them liable in damages and expenses, and appointed them to give in a condescence thereof.

Against this interlocutor the defenders reclaimed ; and, *inter alia*, contended, That this was a penal action *quæ non transit in hæredes*.

When the petition, with the answers, came to be advised, in respect of certain allegiances made for the defenders, the same were remitted to the Ordinary ; meantime, it is not amiss to observe, that on this occasion, it was admitted to be a point certain, that even penal actions transmit in hæredes ubi lis fuerit contestata cum defuncto ; and that with us *lis* is understood to be *contestata* by an extracted act. Only, where the question is *in jure*, *lis* is understood *contestata cum defuncto*, when the matter has so far proceeded, that the defunct has proponed a defence *in jure*.

*Kilkerran, (PERSONAL and TRANSMISSIBLE.) No 6. p. 401.*