

not present, but allows the other to present, and his presentee to be settled, it will not from this follow, that he has right to the next *vice*. *Sibi imputet* that he did not exercise his *vice* when it came: he must wait till it come about again.

PERSONAL AND TRANSMISSIBLE.

AN Action, before the Dean of Guild of Edinburgh, was brought at the instance of

1773. *February*. The PROCURATOR-FISCAL *against* JOHN PAXTON, Stabler;

for using false measures,—in which Paxton was fined, and ordered to prison till payment. He suspended, and before decision died. The Lords found that the action had fallen, and did not transmit against his heir; who could not be punished for his predecessor's fault.

Same 2d *December* 1768, *Peter Williamson against Merchants of Aberdeen*.

CALDER *against* M'KENZIE.

AN act of litiscontestation transmits certain penal actions against heirs, because by this a relevancy is established, and parties join issue in going to proof upon that relevancy; but, in an act allowing a proof before answer, no relevancy is established, nothing is determined at all, no obligation is created which did not before exist, and no room for arguing that the ground of action is rendered transmissible against heirs: Every defence relevant in law, may still be proponed; and, though the libel should be proved, the defender may be assolied.

So it was argued for the Relict and Children of M'Kenzie, tutor of Kilcoy. The case was a transference of an action of oppression and damages, brought by Calder against M'Kenzie, for having defamed him as guilty of an intention and attempt to assassinate him,—concluding also for a censure, and a sum *in solatium*. In this, an act before answer was pronounced and extracted, before M'Kenzie's death: after his death, a transference being brought, Lord Stonefield transferred it, that is, the whole *statu quo*, reserving all defences. And the Lords adhered.

On the above subject, see Bank., V. II, p. 608; Erskine, B. 4, *tit.* 1, § 70.

also p. 591, 642; Falc., *22d January 1751, Hepburn against M'Lauchlan*; Kilk., p. 396, 401; Mack. Obs., p. 136; Dict., V. II, p. 74. See rather on the other side, Fount., *19th January 1710, Lady Ormiston against Hamilton*. But, upon looking at this decision, it is not in point.

PLANTING AND INCLOSING.

1762. *November 19. STIRLING of KEIR against JOHN CHRISTIE.*

By the Act 1698, tenants are obliged to take charge of the planting on their farm. In an action at the instance of Mr Stirling of Keir against John Christie, one of his tenants, "The Lords, 19th November 1762, found that John Christie, the suspender, was obliged, by the Act of Parliament 1698 for preserving of planting, to have preserved and secured all growing wood and planting upon his farm; and therefore found him liable in the value of the sixteen trees cut, at the rate of £20 Scots for each tree."

It appears from the 111 *New Coll.*, No. 99, that six of the above trees were proved to have been cut by Christie and his family; the other ten by persons unknown. The Justices of Peace, before whom the action was originally brought, found Christie liable for the whole. But, in the suspension, he pleaded that he was only liable for those cut by his order, or by his family, &c., but not by persons unknown. And this point, says the collector, though debated, was not determined. At the same time the above-mentioned interlocutor of the Court seems general, and to comprehend the whole trees.

The same point came before the Court, on informations, *anno*

1768. *The EARL of DUMFRIES and STAIR against JOHN and SAMUEL OSBORNS*; but was not decided: it was remitted to the Ordinary.

It again occurred,

1775. *November . MOIR of LECKIE against WALTER MORISON.*

But neither was it here decided; for, although the libel before the Sheriff of Stirling narrated the Act of Parliament, and the legal presumption thereby created, yet the conclusion was laid upon the actual transgression by the tenant and his sons, and servants. And, in the procedure, they dropt the Act of Par-