

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,