It was ANSWERED for the pupil and curators, That, by our law, all minors past tutory may choose curators; and they, having found caution, have good interest, not only to look to the minor's estate, and how the same is managed by the overseer, but also to dispose upon his person where he may be best educated: neither ought the disposition made by the father to be regarded to seclude the curators, that being written by the said Kennedy himself when the father was upon death-bed, and being done of design for his own advantage; seeing, failyieing of children, and heirs of their body, the estate was to return to Kennedy himself: and, albeit it be ordinary, and is allowed, that persons may dispone and entail their estates to strangers, upon such provisions and conditions, that such as they nominate shall have the sole management, yet the same is never done by a father in order to the children's provisions; who, by the law, have right thereto, if the father dispose not otherwise thereof; and the disposition is most suspicious, and contrary to practice, for the reasons foresaid: but, whatsoever that provision of the disposition may import, yet it cannot hinder the minor to choose curators for disposal of his person, or seeing to the faithful management of the overseers.

It was REPLIED for the said Robert Kennedy, That, by our law, there is no distinction betwixt fathers affecting any right of provision made to their children, and where, having no children, they disponed the same to strangers: and, seeing it is clear and undoubted, that fathers may appoint tutors to their children, who can only have care both of their persons and estates; so, in case their children did pass pupillarity, they appointing trustees for managing their estate, there is no place for their choosing curators; because curators *tantum dantur rebus, non personis:* and so this pupil could not choose curators, and do contrary to what the trustees had done before.

The Lords did seriously consider this case; and found, That, albeit Kennedy was appointed trustee for managing the estate during his minority, yet that could only give him a right of management during that time; but that did not hinder the minor, after pupillarity, to choose curators, and, by their advice, to be educated for his advantage, which was not quarrelled in this case: and, albeit the curators could not take from the trustees the management of that estate, yet, in the case of mismanagement, or like to dilapidate the fortune, the pupil had good action, upon that account, to pursue the trustees for security of the estate, or removing them from their trust.

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1676. *January* 7. ALEXANDER LAWRIE *against* The TENANTS of LOGAN and APPARENT HEIR of HALBERT IRVINE.

ALEXANDER Lawrie, being served heir of conquest to his brother, John Lawrie of Maxwelltoun, who was infeft in the lands of Logan upon a wadset of 5000 merks, with a back-tack bearing a clause irritant;—whereupon, having obtained a decreet of declarator of expiration of the back-tack, and reversion for not payment of the back-tack duties, did pursue the heir of Halbert Irvine, granter of the wadset, for payment of the maills and duties.

It was ALLEGED, That the decreet of declarator being suspended, albeit there

was suspension raised, and the letters found orderly proceeded, yet there was a new suspension raised by Halbert Irvine, which was yet undiscussed; and therefore that there ought to be a transferring of the said suspension, before the apparent heir was obliged to answer in this process of mailles and duties.

It was REPLIED, That, albeit a suspension was raised, yet it was never intimated by the defunct; and the pursuer's brother, to whom he was served heir, being likewise dead, there could be no transferring: but the defender might allege, by way of defence, any reason of suspension which was then libelled.

It was DUPLIED, That the suspension was intimated, in so far as there was a relaxation at the market-cross, publicly executed at the defunct's instance; which was a sufficient intimation: and, albeit that had not been, yet, there being a standing suspension, no execution could follow upon the decreet, and so ought to be transferred.

The Lords did consider the custom and practick anent transferring; and found, That a suspension being raised, and never intimated by a citation of the charger in his lifetime, which was far stronger that if the suspender had cited after the day to which the letters were suspended; in which case a charger is *in bona fide* to execute a decreet; they found, that there was no necessity to transfer the suspension in this case, where both the suspender and the charger were dead; and therefore ordained, that the apparent heir of the suspender should propone, by reason of suspension or defence, as he thought fit.

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1676. *January* 13. WILLIAM CUNNINGHAME *against* MARGARET ALLARDICE.

IN a pursuit, at William Cunninghame's instance, as brother and executor to John Cunninghame, against the said Margaret, for repayment of twelve hundred merks, to which she was provided by contract of marriage, failing of children of the marriage, as being *indebite solutum;* she being only provided thereto in contemplation of her part of the contract; whereby she affirmed that there was so much debt due to her, and that she should procure bond therefor, in name of her deceased husband: so that, unless she can prove, that truly that sum was paid to her husband, or bonds taken in his name, she ought to refund the money paid to her, as being *causa data causa non secuta.*

It was ALLEGED, Absolvitor; because the defender had a general discharge of all debts, or other claims whatsoever, upon a special submission and decreet-arbitral, of all differences; and unless it were offered to be proven, by her oath, that this particular was not comprehended nor spoken of, and that her husband never got payment of that sum, conform to her obligement in the contract of marriage, the general discharge ought to defend her: especially seeing the marriage continuing twenty years after the contract, and neither the defunct himself, nor this pursuer, gave up the same in the inventory of debts, and the pursuer's title is only a dative *ad omissa*, after the general discharge.

It was REPLIED, That the libel being founded upon an express obligement to provide, and the subsumption being a negative that it was never done, it proves itself; unless the defender will prove *scripto* that it was performed: neither can the general discharge include this particular, there being nothing then treated