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

by submission or decreet-arbitral, but the right of moveables, which was then confirmed.

The Lords having considered that the general discharge was of all debts and claims; and granted by the pursuer, who was major, *sciens et prudens*, and in all probability could not but consider the whole debts belonging to his brother, when he made this submission; did sustain the defence founded upon the general discharge; unless it were taken away by the defender's oath: and found her not liable to prove payment after so long a time, her husband having right to that debt, both by contract and *jure mariti;* and never having done any diligence by the space of 20 years, for instructing that he was frustrated, the law presumes *in favorem matrimonii*, that the wife's obligement hath been satisfied; and is so strong a presumption that it cannot be taken away but by her oath.

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1676. *January* 17. WILLIAM LAWRIE of BLACKWOOD, and MR JOHN DRUMMOND, *against* SIR JOHN DRUMMOND of LOGIE ALMOND.

IN a reduction, at the instance of Blackwood, who had comprised the lands of Scottistoun, which were disponed to Sir John by Sir Robert Drummond of Meidhope, upon the reason of deathbed,—it being ALLEGED for Sir John, that the disposition was made for onerous and adequate causes of the value of the lands; there being a count and reckoning, and Sir John having condescended upon many debts to him by Sir Robert, and the relief of many other debts, to which he was obliged:—

It was ALLEGED for Blackwood and Mr John Drummond, to whose behoof the comprising was led, That there ought to be defalked the sum of three thousand merks, wherein Sir John was debtor to Meidhope, by a special provision in the disposition of the lands of Meidhope, whereby, besides all the debts therein enumerated, which he was to undertake, he became obliged to pay three thousand merks to any person to whom Sir Robert should appoint, or legate the same during his lifetime; and so *intus habet*, and cannot crave that all sums should be allowed to him, but with defalcation of that debt.

It was ANSWERED for Sir John, That his obligement for that three thousand merks was conditional; in case the lands of Meidhope were freed from all burdens and incumbrances, in which case he was only liable: but so it is, that the whole estate was affected, at the instance of one Logan, with a comprising against Sir Robert, as cautioner for Hamiltoun of Binny, the legal whereof was expired before Sir Robert's death: as likewise there was an infeftment of annualrent, for which infeftment was given out of his estate, for another cautionary, wherewith Meidhope's estate was burdened, and never relieved thereof during Sir Robert's lifetime; so that Sir John was forced to take order with the annualrenter, and compriser, and upon his great charges and expenses to purchase these rights, and redeem the lands, which did far exceed the foresaid sum of three thousand merks; and, therefore, he was not obliged for the said sum, for which he was only bound conditionally, as said is.

It was REPLIED, That Sir John acquiring these rights, having now the estate of Meidhope disburdened, and having disponed these rights, and thereby affected the principal lands, for whom Sir Robert was only cautioner, and thereby