

suspension, and therefore was not convenable till the cautioner in the first suspension was discussed. 'THE LORDS repelled the defence, but ordained the pursuer to assign Mr Patrick to the first bond of caution, upon payment.' The defender further *alleged*, That neither cautioner nor principal could be distressed for the sum, because he offered to prove, by the charger's oath, that the bond was granted to John Hume of Kello, or to his behoof, who was forfault, and so it fell to the King; likeas, Rentoun obtained discharge of it from the King. It was *answered*, That the donatar to the forfaulture concurs with the charger, whose gift was anterior to the King's discharge, and which gift required no declarator, being a forfaulture in Parliament. 'THE LORDS repelled the defence, in respect of the answer' The defender further *alleged*, That he produced a letter from the King to his Commissioner, recorded in Parliament in favours of Rentoun, bearing, 'That the King knew that Rentoun was damned by suffering for his father, in obedience of his Royal commands in L.8000 Sterling, and that he had promised to see him satisfied,' and that this King conceived himself obliged to see his father's promise made effectual in the way he promised, to wit, to cause the Parliament take an effectual course to satisfy Rentoun; and therefore the King did recommend it to his Commissioner, that course might be taken in the Parliament for Rentoun's satisfaction, which letter is before the King's gift of forfaulture, whereby the King acknowledged himself debtor in a liquid sum to Rentoun, which therefore founds a compensation against the donatar, who is the King's assignee. It was *answered*, That the letter doth neither instruct that the King's father, nor himself, were personally debtors to Rentoun, obliging themselves to pay; but only to interpose that the Parliament might take course.

THE LORDS found, that the letter did not make the King personally debtor, and therefore repelled the compensation.

Stair, v. 2. p. 827.

1683. *January 2.*

SOMERVELL *against* COLT.

MR ROBERT COLT advocate, having intented a declarator against Mr William Somervell, to hear and see it found and declared, that he being an attester of a cautioner in a suspension, raised at the instance of one Menzies, against Mr William, of a charge of horning for payment making of 2000 merks, due by the said Menzies to the said Mr William, that he ought to be free, in regard the reasons of suspension were relevant and true, and particularly that reason, that the charge was at Mr William's instance, after he was sentenced by a sentence of the Justice Court to die, and that the sum being made moveable, fell under escheat, albeit *ex post facto*, he had gotten a remission. THE LORDS found, that the charge was null, being at the instance of a condemned person, and the reason of suspension (exclusive of the charger's title, the same falling under es-

No 69.

No 70.

A charge having been liable to an objection when given, although it afterwards came to be valid, the cautioner, and consequently his attester, against whom an action was brought, were found not liable.

No 70.

cheat) was relevant to exoner the attester and cautioner; albeit that now the time of this declarator, he had gotten a remission, the remission being in effect a new title acquired from the King, which was not in his person the time of the charge, or raising the suspension; but the LORDS were of the opinion, that no reasons of suspension that were suspensive of the debt only, such as arrestments and the like, would exoner the cautioner, unless they were either exclusive of the debtor or the title. See QUOD AB INITIO VITIOSUM.

Fol. Dic. v. I. p. 128. Pres. Falconer, No 37. p. 20.

* * Sir P. Home reports the same case :

MR WILLIAM SOMERVELL having pursued Mr Robert Colt advocate, for payment of a debt, as he who had attested William Menzies of Raw, cautioner in a suspension; *alleged* for the defender, That the reason of suspension being found relevant, must liberate the cautioner and the attester, albeit the reason was thereafter elided by an answer for the party; having suspended upon relevant reasons, the cautioner and attester are not farther liable; just as in the case when a decret is turned into a libel, the cautioner and attester are free; as this is clear in general, so much more in this particular case; the charge of horning being given to the principal party at the pursuer's instance, after sentence of death was pronounced against him for a slaughter committed by him; after which sentence, the pursuer being *civiliter mortuus*, the charge of horning, given at his instance, was *ipso jure* null. *Answered*, That albeit the reason of suspension be relevant, yet the reason being elided by an answer, and the letters found orderly proceeded against the suspender, the cautioner and attester must be liable in consequence; they, by the tenor of the bond of caution, being obliged to pay the debt, in case it shall be found, that the suspender ought so to do; and it is not a like case, when a decret is turned into a libel, because it is then no more a sentence or decret, but only an action; and therefore, the cautioner and attester are not farther liable, albeit the principal party be found liable for the debt, because in that case, there is no decret of suspension, nor the letters found orderly proceeded, but only a decret, as an ordinary action, which has only effect against the principal party, but not against the cautioner and attester, who, by turning the decret into a libel, it being *funditus* taken away, they are absolutely loosed, and no farther liable. And albeit the pursuer was under the sentence of death, the time of the giving of the charge of horning, and so repute to be *civiliter mortuus*, yet that cannot liberate the cautioner and attester, who by their bond became civilly and naturally bound to pay the debt in case the same should be found due; especially the pursuer having obtained a remission of the crime for which he was condemned, and so is in the same case as to all effects, as if he had not been sentenced; and, if the defender had granted a bond of borrowed money to the pursuer at that time, it would have obliged them. By that same reason, this bond of cautionry and attestation should oblige them; and if the pursuer's estate had been gifted as the de-

fenders, would have been liable to the donatar, notwithstanding the charge of horning was given after sentence of death was pronounced against the pursuer, by that same reason, they ought to be liable to him, being now restored and having obtained a remission.—THE LORDS found, that the pursuer being under the sentence of death when the charge of horning was given, the charge of horning was null; and found the reasons of suspension exclusive of the charger's title, and seeing the same came under Mr William Somervell's escheat, it was relevant to absolve the attester and cautioner, albeit that now the time of the declarator Mr William Somervell had gotten a remission, which being in effect a new title acquired from the King, and not being in his person the time of the charge, and raising of the suspension, whereof he had no right to the sum. But the LORDS were of opinion, That no reason of suspension that was suspensive of the debt only, such as arrestment and the like, could exoner the cautioner, but only such reason of suspension as did either extinguish the debt, or was exclusive of the debtor's title; and therefore assoilzied the defender.

No 70.

Sir P. Home, MS. v. I. No 218.

1685. November 27. MORE against FINNISON, (OF JOHNSTON).

MORE having charged Finnison for payment of a sum of money, conform to his bond, he suspended upon a reason of compensation, and found _____ cautioner in the suspension; and the suspension having come in the last Session to be discussed, the reason of suspension founded upon compensation was found relevant and proven, and the letters were suspended *simpliciter*; but the decret of suspension having lyen over unextracted, the charger obtained a decret against the suspender for the price of certain bolles of victual, and did now propose re-compensation, wherethro' the compensation was elided, and the letters found orderly proceeded against the suspender: The cautioner in the suspension gave in a bill craving, That he might be assoilzied, in regard the reason of suspension founded on the compensation, was found relevant and proven, but that the same was now elided by an emergent re-compensation, and instanced the case betwixt Mr Robert Colt and Somervell, and others, the 2d January 1683, No 70. p. 2143. THE LORDS suspended the letters *simpliciter*, *quoad* the cautioner, notwithstanding that it was alleged for the charger, that the ground of re-compensation was extant before the suspension, albeit it was not liquid till after the foresaid decret suspending the letters.

No 71.
In a suspension upon the reason of compensation, the charger proponed, and thereafter proved re-compensation. The letters were found orderly proceeded against the principal party, but suspended *quoad* the cautioner, the grounds of re-compensation not having been liquidated until after suspension.

Fol. Dic. v. I. p. 128. Pres. Falconer, No 105. p. 73.

* * Sir P. Home observes the same case :

JOHN MORE maltman in Musselburgh, having charged Marion Johnstoune for payment of the sum of L. 100, contained in her bond; and she having sus-
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