

able, being before the decret of suspension was read in the minute-book, and extracted. No. 15.

Fol. Dic. v. 2. p. 414. Sir P. Home MS. No. 332.

1685, November, & 1687, February.

JOHN MOIR *against* JAMES SAMUEL and MARION JOHNSTON.

The charger upon a bond suspended upon a reason of compensation, having, after pronouncing, but before extracting a decret suspending the letters, liquidated a ground of recompensation, which upon a bill to the Lords was got allowed to elide the compensation; and thereupon the letters being found orderly proceeded; the cautioner in the suspension was assoilzied, because the reason of suspension was relevant and true at the time of expeding thereof, and verified *in terminis*.

No. 16.
What liberates the cautioner?

Thereafter it was alleged, That such a decision would disappoint the effect of cautionry in suspensions, seeing there may be relevant reasons of suspension against the present execution and payment, viz. arrestment, &c. which take not off the debt, but delay payment till purged; and caution being in place of consignation formerly, the cautioner should be found liable for what the letters are found orderly proceeded for; *2do*, Though, when a decret, or registration of a bond *a non suo iudice*, is quarrelable, and therefore turned into a libel, or though, when a charge being suspended on compensation for the whole sum charged for, the charger acquires a ground of recompensation after the suspension, the cautioner in the suspension should be free, seeing compensation is a discharge; yet, when a ground of recompensation was in the charger's person at the time of the suspension, and liquidated thereafter, before extracting of any decret of suspension, the cautioner ought to be liable, because the suspender should have considered the recompensation as equivalent to a discharge of his compensation; so that he was in the wrong to suspend: Reasons of suspension upon partial discharges, or partial grounds of compensation, should not exonerate the cautioner *pro reliquo*; for that his bond bears, that he shall pay what shall be decerned against the suspender.

Answered: The compensation here being total, exhausting the whole charge, and the recompensation not being liquidated till after pronouncing of an absolvitor in favours of the suspender, there was *jus quasitum* to the cautioner.

The Lords were of different opinions; but they adhered to their former interlocutor.

Harcarse, No. 947. p. 266.

* * President Falconer and Sir P. Home's reports of this case are No. 71. p. 2145.

voce CAUTIONER.