

No 71.

pended upon a compensation for the price of several barrels of ale, furnished by her to the charger, for which she had pursued him before the Commissaries of Edinburgh, and adduced witnesses for proving of the libel, which the LORDS sustained, being *de proximo liquidand*. To which it being *answered* by the charger, That albeit the furnishing of the ale, and price, were proven, yet he ought to have re-compensation, because it was offered to be proven, that he had delivered to the suspender a considerable quantity of malt, the price whereof would amount to much more than the ale furnished to the charger, for which he had intented process against her before the Bailies of Edinburgh. But in respect, it was not presently liquidate, the LORDS repelled re-compensation; but thereafter, the charger having liquidate the price of the malt, by an decret; and the suspender not having extracted the decret of suspension, the charger gave in a petition craving, that the LORDS would sustain the compensation founded upon the decret; which, seeing it did take away the ground of compensation, the letters ought to be found orderly proceeded. And there being another petition given in by James Samuel, who was cautioner in the suspension, making mention, that albeit the re-compensation should be sustained to take away the compensation, so as to make the suspender liable for the debt, yet the cautioner ought to be free in respect the reason of suspension founded upon the compensation, was sustained, as was decided, Mr Robert Colt *contra* Somervell, No 70. p. 2143. THE LORDS found the letters orderly proceeded against the principal party, but suspended the letters as to the cautioner in the suspension, in respect the ground of re-compensation was only liquid, since the decret of suspension at the instance of the principal party.

*Sir P. Home, v. 2. No 744.*

1692. November 8.

MARGARET SCHAW and ROBERT CUNNINGHAM, her Husband, *against*  
ROBERT KENNEDY.

No 72.

When a decree upon a registered bond is turned into a libel, as being registered in a jurisdiction to which the debtor is not subject, the cautioner in the suspension is liberated of course.

ON a petition given in by Margaret Schaw, and Robert Cunningham in Monghagen, her husband, against Robert Kennedy, a doubt occurred to the Lords, whether a cautioner in a suspension is liberated, when a decret upon a registrated bond is turned into a libel, because it was registered on a wrong jurisdiction, where the debtor did not then dwell, and so *a non suo judice*, as well as when a decret proceeding upon citation of the party before a judge, is, for some nullity, turned into a libel: And the plurality of the LORDS thought there was no difference; for the charge and execution upon the one being as wrongous and null as upon the other, that instance perished, and the cautioner being only liable for the suspender if that decret subsisted, he behoved to be assoilzied, if it fell to the ground. The next question was, if the registration was sufficient in the

books of that jurisdiction and shire, wherein by the bond they were designed then to dwell, where the creditor knew not of their changing their domicile; or if that must always follow them wherever they remove. But the LORDS thought, though the designation in the writ was a presumption they still continued in that place; yet if the contrary was proven, the new domicile was the place where they could only be convened; *nam actor sequitur forum rei, id est, ubi habitat.* See JURISDICTION.

*Fol. Dic. v. 1. p. 129. Fountainball, v. 1. p. 516.*

1704. February 4.

SIR THOMAS KENNEDY against SIR GILBERT ELLIOT of Stobs.

RANKELOR reported Sir Thomas Kennedy *contra* Sir Gilbert Elliot of Stobs.— Sir Thomas being one of the partners with Sir John Cochran, of the poll laid on in 1693, he transacts with Sir Charles Murray of Hadden, who buys his share, and Sir Thomas takes a back-bond from Hadden to relieve him of the tack-duty, and of all cost, skaith, and damage he could incur thereby. There coming to be loss by that tack, Sir Thomas charges Hadden to relieve him in the terms of his back-bond. He suspends, and finds his son William Murray cautioner; but the clerk to the bills refusing him, Sir William Elliot of Stobs, Hadden's son-in-law, attests him; whereupon the suspension being expedite, it was determined against Hadden; and William the cautioner being likewise discussed, he insisted last of all against Sir Gilbert Elliot of Stobs, as heir to his father the attester; who *alleged, imo*, His father's attestation subjoined to the bond of cautionry was null, as wanting writer's name and witnesses:—*2do*, That the attester of a cautioner in a suspension, is no farther bound but to prove that the cautioner was holden and repute solvent at the time, which William Murray the cautioner then was.—THE LORDS, before answer, allowed a conjunct probation, as to the custom of subscribing attestations in the bill-chamber, and the pursuer to prove the cautioner's insolvency at that time, and the defender to prove he was holden and repute solvent. And the LORDS having advised the probation, found it proven to be the general custom, to receive attestations without either writer's name or witnesses; and also proven, that William Murray, the cautioner, was then solvent: Whereupon decret went forth against Stobs, which he suspended; and, at calling, *insisted* on this reason, That he was minor the time of obtaining that decret against him, and he was lesed by his procurators omitting this relevant defence for him; that Sir Thomas's charge against Hadden, the principal suspender, was null and unwarrantable, being on a general bond of relief, without any previous distress either alleged or produced; and that such an obligent to relieve cannot be the ground of a charge till distress precede; and therefore, the charge being unjust, the suspension must necessarily be just; and if it be relevant, the cautioner is liberate, and conse-

No 72.

No 73.

A charge on a bond of relief, though before distress, was found noways unwarrantable nor unjust. Therefore, tho' the principal suspended such a charge, the cautioner, and his attester were found to remain still bound to the charger.