

* * Sir P. Home reports this case :

No. 14.

Alexander Gordon, Procurator-Fiscal of Kincardine, having pursued David Jamy before the Sheriff for theft, and he being declared fugitive, for not compearance, and he having thereafter raised suspension and reduction of the Sheriff's decret, upon several grounds of nullity and informalities; it was answered for the Procurator-fiscal, That the said David Jamy having been declared fugitive by the Sheriff's decret, he had not *personam standi in judicio* before he first relaxed himself, and found caution, according to law, it being a principle in law, that no man can be admitted to propone any defence that is declared fugitive, and at the horn, before he be first relaxed; for if it were otherwise sustained, then the several courts and judicatories would interfere one with another, and that which would not be allowed in one judicatory should be sustained by another, which would absolutely elude the law; for, by that same reason, a party declared a fugitive before the Justices, might compear and crave the benefit of law before the Lords of Session; which were absurd; and therefore law has introduced, that, as a punishment upon any party that is rebel, or fugitive from the law, he should not have the benefit of law; and, therefore, before the said David Jamy relax, and find caution, he cannot be admitted to pursue or defend any action before the Lords of Session;—as, also, the Lords of Session are not competent judges to any criminal case. Replied, That the said David Jamy having raised suspension and reduction of the Sheriff's decret, upon several grounds of nullity and informality, these must be first discussed; for if the decret be *ipso jure* null, it cannot have any effect in law, and so cannot be sustained to hinder him to compear, or prejudge him of the lawful defence; and the Lords of Session being competent judges to the reduction or suspension of Sheriffs' or other inferior judges' decreets, even in those subjects whereof they are not proper judges *in primo instantia*, as in the case of divorce, scandal, or the like, so the Lords are competent judges *in secunda instantia*, albeit criminal, to cognosce whether the Sheriff has done prejudice or not. The Lords found, that the said David Jamy had not *personam standi in judicio* before first he relaxed, and find caution in the books of adjournal.

Sir P. Home MS. v. 1. No. 22.

1683. January.

BROWN, and The CREDITORS of MARJORIBANKS, against CHAPLINE.

No. 15.

Upon a complaint at the instance of ———— Brown, and the Creditors of the deceased ———— Marjoribanks, late Bailie of Edinburgh, against Alexander Chapline, writer, the Lords found, That Bailie Marjoribanks having suspended the charge of horning upon a bond, albeit the letters were found orderly proceeded, yet the denunciation upon the former charge was found unwarrant-

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.