

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-  
Vol. V.

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 registered 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