1682. *December.* Mr WILLIAM SOMERVILLE *against* Mr ROBERT COLT.

No 3.
A charge of horning on a moveable debt at the instance of a person condemned to death, and whose escheat was fallen, found null, though he afterwards procured a remission.

IT being *alleged* for the cautioner in a suspension, That he ought to be free if any one of the reasons be relevant and proved *in terminis*, though the letters be found orderly proceeded as to the rest, the LORDS demurred on the point; but it seems not out of all question, if the cautioner is simply free. The cause being thereafter called in presence, it was *alleged* for the cautioner, That it was the common opinion, that the cautioner in a suspension was only liable where the reason libelled was not relevant and true; and by the express practice, a party having charged upon a contract containing mutual obligements for non-performance by the other, (who suspended) although the charger offered at discussing to perform instantly, and therefore the letters being found orderly proceeded against the suspender, yet the LORDS found the cautioner in the suspension free; much more should the cautioner in the suspension be free, where the charger had no right to charge for the sums, he being condemned for murder, and all his goods and gear adjudged and decerned by the criminal Judge to belong to the King, which needs no declarator, as escheats upon charges of horning do; for the King having a *jus quæsitum* to the sums charged for, by the criminal sentence, (which was equivalent to an assignation) the condemned party could no more charge for payment than a cedent could for sums assigned by him after intimation of the assignation.

Alleged for the charger; Were this allowed, the benefit of cautionry would be altogether eluded; for there are few suspensions but contain some reasons relevant and true; and it is usual for suspenders to get groundless arrestments laid on in their hands by their own procurement; but the cautioner in a suspension ought to be liable, unless the reason, when verified, take off some part of the sum charged for.

"THE LORDS, in respect of the circumstances of this case, where the pursuer had no title, assoilzied the cautioner;" though at the discussing of the suspension Mr William Somerville had got a pardon from the King for life and goods. But had the suspension been upon a reason of arrestment or compensation or retention, the Lords would not so easily have assoilzied the cautioner.

Fol. Dic. v. 2. *p.* 301. *Harcarse,* (SUSPENSIONS.) *No* 945. *p.* 265.

*** Fountainhall reports this case:

1683. *January* 2. "THE LORDS sustained Mr Robert's declarator, and assoilzied him from his attesting the cautioner in the suspension against Mr William, because they found the charge of horning suspended was given by Mr William when he was under the sentence of death, and so was null; he being

then reputed *mortuus* in law, and not having *personam standi* he could not give charge. No 3.

Fountainhall, v. 1. *p.* 204.

*** Sir P. Home's and P. Falconer's reports of this case are No 70. p. 2143. *voce* CAUTIONER.

1683. *November.* Mr JAMES KEITH *against* Sir WILLIAM PURVIS.

No 4.
An apprising, although acquired by a member of the College of Justice, found an effectual title, notwithstanding the prohibition to buy pleas.

MR JAMES KEITH, writer in Edinburgh, having acquired right to a litigious apprising from James Allan, writer, and thereon insisted in the reduction of another apprising; the defender *alleged*, No process; because, by the 216th act, Parl. 14. Ja. VI. it is not lawful for members of the College of Justice to buy pleas, and the pursuer's title was such a bought plea, which being an unlawful acquisition, cannot found a legal process.

Answered; The prohibitory clause of the act is not *in rem scripta* declaring bought pleas simply unlawful, but is only a personal prohibition; 2*do*, The act doth not annul the deed, but only inflicts a punishment upon the contravener, as was found in my Lord Cranston's case, 30th July 1635, No 34. p. 3210. and in Sir Thomas Hope's, November 9. 1624, No 19. p. 7943.; and it is clear from the current acts of Parliament, that where the deed is designed to be annulled, it is expressly so declared; witness the many laws concerning the export or import of several goods and commodities.

Replied; The act *hoc ipso* by declaring the deed unlawful, intends it should be null; and the adjecting sometimes the clause of annulling in prohibitory statutes, is but done *ob majorem cautelam*, for declaring the lawgiver's *enixam voluntatem* against such deeds.

"THE LORDS sustained the answer, and found, that the acquisition was not null by the act of Parliament, and that the party might insist for the punishment of deprivation, as he thought fitting. But he, Mr James Keith, had deserted his employment ten years before." It was not regarded, that James Allan being also a member of the College, it was but the acquiring of a plea by one member of the College of Justice from another.

Harcarse, (ADVOCATIONS AND ADVOCATES.) *No* 13. *p.* 4.

*** Fountainhall's report of this case is No 47. p. 9500. *voce* PACTUM ILLICITUM.