

1680 and 1681. GEORGE HOME *against* SIR ALEXANDER and PATRICK HOME.

1680. *December 14.*—GEORGE HOME, as donatar to the forfeiture of HOME of Kello, his brother, pursuing Sir Alexander and Mr Patrick HOMES, as representing Renton, their father, for a sum owing by him to the forfeited person :

ALLEGED,—Compensation against the King, (from whom the gift of forfeiture flowed,) upon a bond due by the King to their father. ANSWERED,—This did not meet the donatar. REPLIED,—It extinguished *pro tanto in ipso momento* that the forfeiture devolved to the King, he thereby becoming both debtor and creditor.

Newton took this to the Lords' answer. See 6th of Jan. 1681.

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1681. *January 6.*—The compensation proponed (14th Dec. 1680,) by Mr Patrick HOME against the King, being reported, the Lords inclined to sustain the compensation, but evaded it upon another point, as not being proven by the King's letter produced, which acknowledged indeed the debt, but recommended to the Parliament to fall upon a way to pay it: and so, being limited by that special destination and method laid out by the King for payment of it, it could not compensate.

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1681. *January 6.*

IN an action for payment against a cautioner in a suspension, he alleged absolvitor; because, the principal not having subscribed the Act for his relief, he being only an accessory, (*qui sublato principali tollitur,*) he could not be tied.

The Lords found him obliged, seeing it was on his own peril that he did not look to his relief. Yet, *negotiorum gestorum actione*, he may seek it.

This, being a judicial enacting, differs from the case of a cautioner in a bond, anent whom it may be questioned, if he be obliged where the principal does not subscribe; for, though they be *correi debendi*, and each of them bound for the whole conjunctly and severally, yet it may be said to be only a renunciation of the *beneficium ordinis et discussionis* in order to ready access and execution against either, but not to be a renunciation of the pendency of the obligation itself, *in suspenso*, till the principal sign it. See 27th July 1671, and Haddington's Index, *voce* Caution, *n.* 10, where the cautioner is freed, the principal not subscribing; and Stair is of the same mind, *tit.* 3, *in fine*.

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1681. *January 8.* GRANT of KIRKDALES *against* GORDON of BIRKENBURN.

A REDUCTION of a disposition by a father to a son, on the Act 1621, was this day advised. The Lords had, by the Act of Litiscontestation, sustained thir two defences against the reduction; *Imo*, That the father was not a bankrupt, but had an estate *aliunde* in moveables, sufficient to pay the debt acclaimed,