

No. 42. the charge *in toto*; and the charger's assignation not intimated in the cedent's lifetime, was not a sufficient title without confirmation, which made in effect a new title.

The Lords gave no answer to the first reason of reduction, but found the horn- ing null upon the second reason, which was repeated by way of exception in a new suspension, and the King and Officers of State not called; and they thought, that to find the letters and charge orderly proceeded, was not the proper decerniture in the suspension, but that it ought to have run in the terms of a new decret.

Fol. Dic. v. 2. p. 417. Harcarse, p. 144.

SECT. VIII.

Consignation.—Caution.

1740. June 18.

M'GARROCH *against* SCOT.

No. 43.
A charge on a decree of modification and locality cannot be suspended but on consignation.

A Minister having charged a tenant for the whole sum, which, by his decree of locality, was allocated upon the lands, whereof the said tenant's mailing was a part; and the tenant having offered a bill of suspension upon caution, it was past upon consignation only, by two consecutive interlocutors, though it was urged, that where the party charged is not decerned against *nominatim* in the decree, then the hornings on such decrees are only called general letters; but when the party is named in the decret, and decerned against *nominatim*, then that is a special decree; and such only are those which the act 1669 forbids to be suspended but upon consignation.

N. B. The last petition was refused by the narrowest majority.

Fol. Dic. v. 4. p. 320. Kilkerran, No. 1. p. 531.

* * * C. Home reports this case :

Mr. M'Garroch having obtained a decret of modification and locality, whereby there was allocated a certain sum to him out of the lands of Davington, he charged Scot the tenant for payment; who offered a bill of suspension, craving the same might be passed upon caution without consignation, upon this ground, that the 6th act 1669, which discharges the suspension of Ministers' stipends otherwise than upon consignation, concerns only the case where the Minister has a special decret for the sums charged for; consequently the statute does not touch charges upon general letters which may be given at random, but where a decret is taken in an

ordinary action for payment of the sums charged for, which is called in the statute a special decret.

No. 43.

Answered : This is not a charge upon general letters, but is founded upon a special decret of modification, &c. whereby a particular sum is allocated upon particular lands, and the heritors, &c. are decerned to pay the sum so allocated ; and if this charge could be suspended without consignation, it is easy to see how Ministers might be distracted by pleas before they got payment of their stipend. Ministers have now only alimentary provisions out of the teinds, and the law has provided, in their favour, that suspensions of their stipends should not so easily pass as in other cases, that they may not be withdrawn from their charges by unnecessary law-suits for recovering their stipends. It is frivolous to pretend, that by special decreets, in the act of Parliament, are meant decreets taken upon an ordinary action against particular persons for payment of particular sums ; for, though such decreets may be necessary, where the Minister has nothing to found upon but use of payment, yet where he obtains a decret of locality, that is a special decret, upon which he can, without necessity of an ordinary action, charge the possessors of the ground ; and if it were otherwise, he could have little benefit from the act, by a decret of locality, in case he were obliged to convene the tenants upon every occasion in an ordinary action.

The Lords passed the bill upon consignation only.

C. Home, No. 153. p. 261.

1794. December 13. ALEXANDER GOVAN *against* JOHN GRAY

John Gray having presented a bill of suspension against a decree of an inferior judge, in favour of Alexander Govan, it was passed on caution.

The cautioner, after the suspension had come into Court, having become insolvent, the charger craved, that the Lord Ordinary would assign a term for the suspender's finding new caution, under certification, that the letters would be found orderly proceeded against him.

The Lord Ordinary took the point to report on minutes, and the Court afterwards ordered memorials. For the charger, it was

Pleaded : The same expediency which has made caution the condition of obtaining a suspension, seems to require its renewal on the bankruptcy of the cautioner, during its pendency, especially as the choice of the original cautioner lies not with the charger himself, but with the clerk of the bills ; Bankton, vol. i. p. 458. § 26.

Although the charger cannot quote any case directly in point, his plea is strongly supported by analogy. In the case of judicial sales, the creditors are entitled, on the failure of a cautioner, to insist for new caution ; 8th March, 1769, Stark and Clark against Johnston, (Not reported.) The Lord Lyon exacts new caution from messengers, as often as he finds it expedient. Notaries, if required, are oblig-

No. 44.

When a cautioner in a suspension becomes bankrupt during its dependence, the charger cannot insist for new security.