1710. *July* 27. LAMB *against* CLELAND.

No. 19.

The Lords found it unwarrantable in a messenger to commit one to prison by virtue of a caption for debt, after intimation of a sist upon a bill of suspension obtainded by the pursuer, although he was in the messenger's hands, before the sist was intimated or procured.

Fol. Dic. v. 2. *p.* 414.

*** This case is No. 14. p. 1700. *voce* BONA ET MALA FIDES.

1743. *February.* ANDERSON *against* BEGBIE.

No. 20.

Purpose and effect of protestation.

Upon the 6th July, 1741, Begbie obtained a decree against Anderson before the Sheriff of Edinburgh. A bill of suspension was presented 14th July, and was passed without answers. Upon the 28th, Begbie occasionally hearing that his decree was suspended, put up his protestation in common form. Upon the 29th, the suspension was intimated to him under form of instrument, which bore the date of the suspension, but not the day of compearance. And though a protestation is not usual till the day of compearance be past, the charger was advised, that this intimation, silent as to the day of compearance, did not oblige him to withdraw his protestation. It continued in the minute-book, and no party appearing in behalf of the suspender to have it scored, he extracted the same after it was read in the minute-book.

The suspender entered a formal complaint of this proceeding as irregular, upon the following medium: "That, by constant practice, the day of compearance in a suspension is always fourteen days after the date of the letters; and therefore thought the day of compearance was not intimated to the charger, yet as the date of the letters was intimated to him, he must have known that the day of compearance could not be before the 28th, and upon that account was *in mala fide* to put up his protestation until that day was elapsed." This complaint, with the answers, were remitted to an Ordinary to inquire into the practice, and to report.

For want of precedents in this case, the debate was reported, with the opinion of several members of the Court. It was set forth for the suspender, that his letters of suspension bore a warrant for citing the charger to compear the 1st of November then next; superseding the decree, and execution thereof, till the 10th of the said month; and that though the intimation did not contain the day of compearance, yet that the charger was put *in mala fide* to enter his protestation before the day of compearance, because, knowing the suspension, it was his duty to inquire about the day of compearance, which he had access to do at the Signet. At least he could not put it up before the 29th July, because of the constant

No. 20. practice, that the day of compearance in a suspension is always fourteen days after the date of the letters. And to support this reasoning, he produced several declarations from members of Court.

The charger, to justify the step he had taken, attempted to deduce this matter from its origin. A suspension is a summons, in which warrant is granted to messengers at arms, to cite the charger to compear in Court at a certain day; and, in the mean time, the letters declare the charge to be suspended, and also for ten days after the day of compearance; which time it would seem was thought sufficient to try the verity of the reasons of suspension. Such is the stile of a suspension to this day. While a suspension had but this temporary effect, there could be no need of a protestation to call for a suspension; if the suspender got not his suspension called within ten days of the day of compearance, the suspension was at an end of course.

But this form became obsolete; when, and upon what account is a part of the history of our law, of which we have scarce any traces in our law-books; only it would appear not to have been altogether out of use so late as Sir George Mackenzie's days, who observes, "That the effect of suspension is to stop the execution of sentences for a time." Institute, Book 4. Tit. 3. § 2. But by whatever means the alteration has happened, a suspension at present is a stay of diligence till it be discussed; and as it is not the suspender's interest to discuss his suspension, this new effect given to it makes it necessary for the charger to get the stay to his diligence removed, by having the suspension discussed. This introduced a new form, which is, that the charger must call for the suspension, by putting up a protestation in the minute-book.

During the period that a suspension had no effect beyond a limited day, it was necessary for the suspender to follow out the will of the letters, by citing the charger to appear in Court at the day named in the letters, in order to have his suspension called, and his reasons of supension sustained; for if these be neglected, the stay was at an end by the elapsing of ten days after the day of compearance. But now that a suspension has the effect of staying execution till it be discussed, though not called nor brought into Court, the suspender has no occasion to cite the charger according to the will of the letters, unless with the view of intimating the suspension to him; and as suspensions pass upon bills, which are generally appointed to be answered, this appointment brings the charger into Court, who thereafter cannot be supposed ignorant of the fate of the bill whether it pass or be refused, which makes intimations in a good measure unnecessary; because when a suspension has passed upon bill and answers, the charger will not venture to go on with his diligence, until he extract a protestation. And when a bill is past without answers, of which the charger may be in probable ignorance, even there it has crept in by degrees to be thought sufficient to intimate the suspension to him under form of instrument, without necessity of a regular citation by a messenger.

Where a suspension is passed after answers are given in to the bill, the charger

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who gives in the asnwers, is thereby put *in mala fide* to go on with diligence, " till the suspension be taken out of the way by a protestation ; at the same time, it is not understood as any part of his duty to search the signet books for the day of compearance ; and therefore, where the day of compearance is not intimated to him by the suspender, he may put up his protestation at random ; against which the suspender's remedy is to have the protestation scored if entered before the day of compearance. This is the constant practice ; and if there be no application for scoring the protestation, it is held to be regularly extracted, though put up before the day of compearance.

But then, says the suspender, " The date of the suspension was intimated, and as never fewer than fourteen days are allowed for the day of compearance the charger was *in mala fide* to put up his protestation untill after the fourteen days were elapsed :" And it is true, that, by this reasoning, the charger put up his protestation too early by one day.

In answer to this argnment, it was urged in the *first* place, That there is no certain time fixed by law or custom for the day of compearance. On the contrary, Lord Stair, Book 4. Tit. 52. § 35. handling this subject, has the following words, " That this day ought to be according to the distance of the parties, that there may be sufficient time to use citation." And as the parties here were near neighbours, the charger an indweller in Edinburgh, the complainer in Leith, the very shortest day might suffice, and so the charger was *in bona fide* to believe that the day of compearance might be elapsed when he put his protestation. In the *second* place, supposing fourteen days customary as the shortest time, then the 28th of July might be the day of compearance, and it was lawful for the charger to put up his protestation that very day. With regard to this, the suspender is in a mistake, when he supposes, that protestation cannot be put up " till the day of compearance be past. The contrary will be plain upon considering the nature of a protestation. What gives rise to this judicial step is, that a party is called to compear upon a certain day to answer, &c. He compears accordingly, but his party does not appear to lay any claim against him. Upon this, it is lawful for him to take instruments in the clerk's hands upon his compearance, and to protest that he shall not be bound to compear a second time without a new citation. This is the meaning of a protestation ; and it is evident from the very nature of it, that it may be put up upon the day of compearance.

The defender was assoilzied, because of the common practice ; but the Lords talked of an act of sederunt to regulate this matter."

Rem. Dec. v. 2. *No.* 40. *p.* 65.

*** See No. 41. p. 11988. *voce* PROCESS.