

1776. *December.*

A DEBTOR having presented a bill of suspension, to which answers were given in, followed by replies and duplies, the bill was past upon caution; but no caution being found within the time limited by Acts of Sederunt, the debtor was apprehended by a messenger. While in custody, before actual incarceration, he presented a new suspension, and obtained a sist; notwithstanding whereof, having been incarcerated, he presented a complaint, setting forth, *Primo*, The illegality of incarcerating him after a bill of suspension past, without a certificate from the Bill-Chamber that no caution was found; and, *secundo*, This illegality increased after a sist on a new bill of suspension obtained and intimated. But the Lords rejected the complaint unanimously. They held that a certificate, such as mentioned, was proper, but not necessary; and they held that a sist on a bill of suspension, intimated after apprehension, did not stop incarceration.

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CUNNINGHAM *against* ALEXANDER and HOGG.

WHEN a messenger apprehends a person, he has right to carry him to prison, but no right to detain him or carry him any where else. But, should it so happen, that, betwixt the time of apprehending him and of incarcerating him, a bill of suspension should be presented, a sist obtained, and intimated, or a sist be intimated, obtained on a bill before apprehension; the question is,—What must the messenger do?

This point was fixed, 1st August 1775, *Cunningham against Alexander and Hogg*; when the Lords found, That, after a messenger has apprehended a person upon a caption, he may, notwithstanding of a sist upon a bill of suspension, whether obtained before or after the apprehension, and intimated, proceed to incarceration.

The point had been decided differently, 27th July 1710, *Lamb against Cleland*, observed by Forbes, and in the Dictionary, *voce* Suspension.—(But see Fount. 18th November 1707, *Edmonston*.) But, in this case of *Cunningham*, it appeared that, in several later cases, the Lords had gone contrary to that decision, which was a single one, and had found that a messenger, after apprehending a debtor, acts properly in not liberating him from confinement, and even in incarcerating him, notwithstanding of a sist intimated to him as said is; for they consider the apprehension of the messenger to be the imprisonment, and the moment when liberty ends, imprisonment begins.

The cases cited were *M'Intosh of Borlum against M'Pherson*, decided *March 1759*; *Beaty against Graham*, in Lord Elchies' Manuscript, decided *29th July 1726*; and *M'Intosh against Dawson*, decided *15th November 1734*, also observed by Lord Elchies.

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See ACT 1696.