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is defined by Bankton, *Lib. 3. tit. 1. § 54.* 'A preparatory diligence, in order to 'adjudge a subject to the arrefter;' while it creates upon the subject such a *nexus* as does not fall upon the death either of the arrefter or of the arrestee; whereas inhibition is simply a personal prohibition, and expires with the person against whom it is used.

'THE LORDS adhered.'

N. B. By a clause in the act 12th Geo. III. cap. 72. it is enacted, That, from and after the 15th day of May 1772, summary execution, by horning, or other diligence, shall pass upon bills, whether foreign or inland, and whether accepted or protested for non-acceptance, and upon all promissory-notes, duly negotiated, not only against the acceptors of such bills, or granters of such notes, but also against the drawers of such bills, and the whole indorsers of the said bills and notes, jointly and severally, excepting where the indorsation is qualified to be without recourse, saving and reserving to the drawers or indorsers, their respective claims of recourse against each other, and all defences against the same, according to law.

Act. Ilay Campbell.

Alt. R. Sinclair.

Clerk, Campbell.

Wallace, No 12. p. 28.

1773. December 16.

UNIVERSITY OF GLASGOW, against ARCHIBALD HAMILTON of Rosehall.

No 10.

Although a charger consent to the passing of a bill of suspension, and obtain a remit to discuss the reasons summarily; the charge, when turned into a libel, makes a dependence to found an arrestment at his instance, until caution be found in common form.

MR HAMILTON of Rosehall, having been served with a charge of horning, upon an old general decree, obtained at the instance of the University, as titulars, for payment of a large sum, as the amount of his bygone teinds, he presented a bill of suspension to the Court of Session. The University consented to the passing of this bill, and gave in a petition for a remit to the Lord Ordinary, to discuss the reasons summarily on the bill; which accordingly was granted.

Some proceedings ensued before the Ordinary, who turned the charge into a libel; and Mr Hamilton put in a condescence, which the University were allowed to see, and an order made upon parties to be ready to debate. Meanwhile, the University presented to the Lord Ordinary on the bills, a bill, setting forth the charge given to Mr Hamilton, for payment of his bygone teinds; the bill of suspension that had been passed of this charge; remit to the Ordinary to discuss the reasons summarily upon the bill; and then proceeding as follows:—
'Since which time, the said process of suspension has been several times called, and insisted in before the Lord Ordinary; but, through the opposition of the suspender, is not yet come to a conclusion, as the said depending process of suspension here to shew will testify; and the said Archibald Hamilton knowing perfectly,' &c.; and, therefore, praying for letters of arrestment, until caution be found, &c.

Mr Hamilton, the suspender, was in opulent circumstances, which the chargers admitted to be the case; but alleged, that the dilatoriness of their party justified their taking this compulsory step. But a doubt having occurred, whether, matters thus standing, the University were entitled to letters of arrestment against Mr Hamilton, this point was made the subject of a report.

Argued for the University: It is a matter of daily practice to raise both inhibitions and arrestments on depending actions; and as, in the present case, there is clearly a depending process, in which the University are insisting for decree for certain sums of money; so it does not occur why they should be denied the benefit of letters of arrestment, in common form. All that is wanted for obtaining letters of arrestment on a dependence, is to produce evidence that there is a dependence; and, accordingly, the deliverance in these cases, is in these words, 'because the Lords have seen the dependence within mentioned.'

A dependence may be created in different ways, as well as by an executed summons. It may be created by summary petition, or by suspension, or advocacy; and, when there is evidence produced of a depending process, in whatsoever manner created, the party insisting in such process for payment of a sum of money, may apply for letters of arrestment on the dependence.

When a bill of suspension is passed, and the letters expedited, the creditor calls for the suspension, and demands decree for the sums charged for; and, if delays occur, and interlocutors are pronounced, which prevent the letters being found orderly proceeded, or which turn the decree charged on into a libel, or which, in any other way, render it a depending process, the charger is entitled to obtain letters of arrestment thereupon. In like manner, when a suspension is passed of consent, and the charger obtains a warrant to discuss the reasons on the bill, he then becomes pursuer, or claimer, either of a sum of money, or of the performance of a fact; and, accordingly, he may either have letters of arrestment, or inhibition, upon the dependence thus created.

Argued for Mr Hamilton: There has been no intentional delay on his part; and the demand now made, is not in common form, but *extra ordinem* in every view, and wholly inconsistent with the former conduct of the University in this suspension. The University might have demanded consignation, had not the charge been illegal, null, and void. The consignation, however, is given up. The suspension is passed, when, in common form, caution was requisite. This the University did not require. But they rather embraced that privilege, competent only to chargers, of applying for a warrant to discuss the reasons summarily on the bill; which, in law and practice, is held to be an express renunciation, both of consignation and caution; the University, therefore, are excluded by their own proper and recent act, and must be held in the same situation as if consignation had been made, or caution found; Stair, b. 4. tit. 52. § 20.

The general position maintained by the University, takes it for granted, that, in every case where process is commenced, letters of arrestment may be used; because, in all of them, there is a dependence. But there are many processes

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which are not the foundation of arrestment; nor is it granted, as it would be ruinous and unequal to debtors, *e. g.* in actions *ad factum præstandum*, in all declaratory actions, and in reductions. The *depending action*, therefore, or the ‘*above dependence*,’ so far as to found an arrestment, is, by the law and invariable practice, understood to be a summons executed against a debtor for a liquid debt; and letters of arrestment on such actions, depending before the Court of Session, are issued by deliverance of the Lords, upon a bill, setting forth so much of the libel and conclusions as explain the nature and tendency of the action, and the amount of the debt and expenses demanded. Along with this bill, the summons and execution are produced. The deliverance on the back of the bill is in these terms, ‘*fiat ut petitur*: Because the Lords have seen the ‘dependence within mentioned,’ *i. e.* the summons containing the amount of the debt demanded. To carry it further, will be a novelty, and is unprecedented.

A suspension is the very reverse of such dependence; because, both in propriety of language, and in the law, it is a stop of all payment and execution, and a virtual reduction. For such is the will of a suspension.—‘THE LORDS ‘have suspended, and hereby suspend the foresaid letters and charge, hail effect ‘and execution thereof, grounds whereupon the same proceeded upon the said ‘complainers, discharging hereby all officers and messengers at arms, of all putting of the said letters to any further execution against them, and of their offices ‘in that part in time coming.’

N. B. The clerk of the bills being called, he informed the Court, that there was no instance of an arrestment granted on a dependence, by way of suspension; but the practice was, to issue an arrestment on the ground of debt; so that the question was entirely new, and came to be determined upon principles.—Here, the circumstance of the charge having been turned into a libel, was what chiefly weighed with the Court, together with an *observation* on the bench, That a suspension was not a stay of diligence, save against the person only, though, if nimious diligence were used, it could be checked: That, where a warrant to discuss the reasons summarily is applied for, that indeed is passing from caution, to avoid delay; but is not a passing from the other aids of law; and, where the charge is turned into a libel, the point becomes much clearer, than in the case where the letters are expedite, and caution found, as there is an end of the charge, and a dependence created in the former case, on which arrestment must be competent; and, *lastly*, That it is no good reason to deny arrestment on the dependence, because it may be got upon the ground of debt; for that it may be of consequence to have this remedy, where the ground of debt is of such a nature that diligence cannot be had upon it.

The following deliverance was given:—‘THE LORD ORDINARY, after advising with the Lords, finds, That, in this case, this bill should be passed, because the Lords have seen the dependence.’

Reporter, *Pitfour*, Ordinary on the bills.

Act. Ro. Cullen.

Alt. Da. Dalrymple.

Wallace, No 98. p. 252.