

No 1. debtor; for, if the cautioner in the suspension was not answerable to pay the debt, the creditor would be prejudged, who would not find the debtor so easily to be apprehended, and put again in ward; so that it might seem reasonable, that if the suspension should discuss in favour of the creditor, that he who was bound to enter him, should be holden to enter him, *eo casu* to the creditor to be warded.

Clerk, Hay.

Fol. Dic. v. 1. p. 114. Durie, p. 417.

1663. February 12.

EARL of SOUTHESK' and CARNEGIE against BROOMHALL.

No 2.
A bond of presentation found implemented, tho' the debtor was not produced till a day after the time appointed, which being *modica mora*, was not regarded, unless the creditor could instruct some detriment by the delay.

BROOMHALL having taken the Lord Sinclair with caption, Southesk and his son gave bond to produce him to the messengers, or to pay the sum on the third of February, betwixt two and ten; whereupon Southesk having re-produced him, craved by supplication his bond up, or to be declared satisfied and extinct.—The defender *answered, first*, He not being a member, or dependent on the College of Justice, cannot be called thus summarily; especially to declare a bond void, which is in effect a reduction. *2dly*, The bond was not performed, in so far as the Lord Sinclair was not re-produced till the 4th of February.—The pursuer *answered*, That the defender living in Edinburgh, and not comparing, the bill, *per modum quærelæ*, might be sustained. To the *second*, it being *modica mora* of one day, without damage to the defender, and there being trysting amongst the parties all the time betwixt, it was sufficient.

THE LORDS sustained the petition, and found it extinct.

Fol. Dic. v. 1. p. 114. Stair, v. 1. p. 177.

1672. November 16. KENNAWAY against DAVIE.

No 3.
Found in conformity with the above.

JAMES DAVIE having enacted himself to cause William Cassils compt and pay to David Kennaway some excise uplifted by him, or to return him to prison by such a day, or otherwise to pay the debt; whereupon Kennaway pursues for payment:—The defender *alleged* absolvitor, because he had fulfilled, in so far as Cassils had offered himself to the Bailie upon the precise day agreed upon, being Saturday, and upon Monday thereafter had actually entered to prison, and there continued several months, which being *modica mora*, was sufficient.—It was *answered*, That implement could only be in the terms of the bond; and if need be, it was offered to be proven that Cassils was set out by the Bailie, with Davie's consent, without the consent of Kennaway, or by order of law.

THE LORDS found, That Cassils' entry being the next lawful day, it was *modica mora*, and was sufficient implement, unless the pursuer could instruct a detriment to him betwixt the days; and found also that reply relevant, that Davie consented to the prisoner's liberation, to make him liable.

No 3.

Fol. Dic. v. 1. p. 114. Stair, v. 2. p. 119.

1681. July 7.

POLSTEAD, Citizen of London, against Mr RICHARD SCOT, Minister.

SAMUEL POLSTEAD having apprehended Maxwell of Kirk-house by caption upon a bond of 2600 merks, did, at the desire of Mr Richard Scot minister, dismiss him upon a bond, 'to present him at Dumfries the first day of February last, or otherwise to pay the sum;' and now being charged to pay the sum, he suspends upon this reason, that Kirk-house was taken with another caption at Edinburgh, whereby it became *factum imprestable* to present him at Dumfries the day foresaid, but he was willing to present him now in as good condition as he was before.—The charger answered, *non relevat*, for albeit death, or sickness, or any accident not occurring by the prisoner's fault, might have been relevant, if the party had been offered so soon as that accident ceased; yet it cannot be extended to any impediment by the prisoner, or his cautioner's fault or fact, such as to be under the hazard of other captions; for if that had been expressed, as it is pretended to be implied, no man of sense would have dismissed a prisoner in these terms that he should be re-produced such a day, if he were not taken by other captions for his own debt.

No 4.
It would be a good defence against a bond of presentation, that the presenting had become *factum imprestable*, without any fault of the debtor or his cautioner. But the being imprisoned for another debt was considered to be the fault of the debtor.

THE LORDS repelled the reason simply, albeit the prisoner had been offered immediately after he was free of the other caption.

Fol. Dic. v. 1. p. 114. Stair, v. 2. p. 888.

1682. March 3. RICHARD OCKLEY against GRIERSON of Lag.

A PERSON obliged to present a rebel upon a precise day, betwixt two and three, not having offered him till between seven and eight, being charged for the debt, suspended upon this reason, that their journey was retarded some hours, upon the account that the day of presentation was a public fast-day by authority, and that the rebel was carried to the pursuer's house, and offered to him, but he refused to accept of him; and the defender not being master of the caption, could not put him in prison.

No 5.
A reasonable cause for not presenting the debtor at the precise hour, will be sustained.

THE LORDS sustained the reason; the suspender giving his oath, that the fast was the reason he was not presented at the precise hour, and burdened the suspender to present the rebel *cum omni causa*, within fifteen days.

Fol. Dic. v. 1. p. 114. Harcarse, (CAPTION.) No 229. p. 54.