

decerning them to remove from the lands of Black Dumganock, which he had purchased from the former heritor thereof; there was a suspension raised of that decreet; and Barklay's doers having put up a protestation in the minute-book, calling for that suspension, it was accordingly produced, but, by mistake, given to the advocate's servant, who in all other cases was ordinary for both parties, but in this refused to be for either. The suspension fell by, but was afterwards found upon search. Mean time, upon this production of the suspension, the protestation was scored; but a second protestation being put up, still calling for the suspension, (which was not as then found out,) this second one was extracted, and the decreet of removing put to execution.

Upon this there was a complaint given in to the Lords against Barklay by Sir George and Cuill, for contempt of their Lordships' authority, in extracting protestation and executing the decreet, after the suspension was produced at the minute-book.

It was mainly urged for the defender in this cause, That, granting the putting up the second protestation is not exactly agreeable to form, yet custom in such cases maketh law; and the minute-book doth prove it, that custom hath established this form, and that it is always usual for suspenders in such cases to appear, and cause score such protestations, where the suspension hath been formerly produced. And, as it is usual, so in some cases it is necessary; for, if a suspension should be produced, and again return into the suspender's hands, which very often happens, the charger hath no other way to force it out but by a second protestation. Howbeit, the thing being customary, the doing it can never be reckoned a wilful contempt.

ANSWERED for the complainers, *1mo*, That custom can never support wrong; and whatever the keeper of the minute-book do in supporting that custom, is plainly unjustifiable and unwarrantable. *2do*, It was denied, that when a suspension called for comes to the hands of the advocate calling for the same, (which he alleged was the present case,) that ever there was a second protestation put up again, calling for the same suspension; for if that were allowed, it were impossible the most vigilant could be safe, but many times might be over-reached: and it would open a door to such frauds as could not well be prevented; since, if a charger be allowed to put up two protestations, he might as well pretend to put up an hundred, which, considering the expense, would be most oppressive.

The Lords found the defender guilty of no contempt of their Lordships' authority, but modified L100 Scots for the complainers' damages and expenses.

This was adhered to upon a reclaiming petition.

*Act.* Alex. Menzies. *Alt.* Ro. Dundass. Robertson, *Clerk.*

*Vol. II. No. 42. page 57.*

---

1717. *January 4.* MAXWELL of Cuill *against* M'CLELLAN of Barklay.

THE case betwixt these parties having been already stated, as decided the 13th December last, the complainer now represents a new point in fact, viz. That Bark-

lay having put the decreet of removing to execution, and ejected him, and having some months thereafter been reposed by the Lords' authority; Barklay, in the interval, and during his own unwarrantable possession, grazes on the lands a great number of cattle; whereby he was a gainer, and the complainer a loser, as wanting the grass for his own cattle.

The Lords remitted to an Ordinary to take trial how far the defender was a gainer, by taking possession of, or grazing cattle on the lands in controversy; and, in case it were found that he was thereby *lucratus*, they granted power to the said Ordinary to modify further damages and expenses, effeiring to the defender's gain and the complainer's loss by want of possession.

*Act.* Alex. Menzies. *Alt.* Rob. Dundass. Robertson, *Clerk.*

*Vol. II. No. 46. page 62.*