

SA59

Opinion-Gowan, J.

SA59-SA71)

A45

MEMORANDUM

OPINION

SUPREME COURT, SUFFOLK COUNTY [AKS-A19] SPECIAL TERM, PART I

GEORGE SASSOWER,  
 Petitioner,  
 VS.  
 JOHN P. FINNERTY, Sheriff of Suffolk  
 County,  
 Respondent.

BY GOWAN

RECEIVED  
J. S. C.

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DATED March 20, 1980

INDEX 177-11904  
 SECTION 115.1, 154 and 1179  
 DATE: 2/20/79 and 5/8/79

PEOPLE OF THE STATE OF NEW YORK  
 ex rel. GEORGE SASSOWER,

Petitioner-Relator,

- vs -

SHERIFF OF THE COUNTY OF SUFFOLK,

Respondent.

GEORGE SASSOWER,

Plaintiff,

INDEX #71-17671  
 MOTION #1700  
 DATE: 2/20/79

vs.

ERNEST L. SIGNORELLI, et al.,

Defendants.

GEORGE SASSOWER,

Plaintiff,

vs.

SHERIFF, SUFFOLK COUNTY,

Defendant.

GEORGE SASSOWER, Esq.,  
 Petitioner pro se  
 75 Wykagyl Station  
 New Rochelle, N.Y. 10801

VINCENT G. BERGER, JR., ESQ.  
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 Hauppauge, N.Y. 11707  
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STATE OF NEW YORK  
 DEPARTMENT OF LAW  
 Attorney General's Office  
 Attn: EMANUEL KAY, Assistant Attorney General  
 Attorney for JUDITH SIGNORELLI and SHERIFF  
 Two World Trade Center  
 New York, New York 10038

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MEMORANDUM

31-1044

Form 010

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

BY

[REDACTED]

J. S. C.

VS.

DATED March 20 19 80

INDEX 177-11904

PETITION 1153, 154 and 1179

DATE: 2/20/79 and 3/0/79

INDEX 170-17671

ARTICLE 1170X1

DATE: 2/20/79

For the purpose of this decision only, the following are consolidated:

(1) the motion by the Public Administrator of Suffolk County for leave to intervene in two of these actions and to have them referred to the Appellate Division of this Court for determination; (2) the motion by JUDGES SIGNORELLI and SEIDELL, defendants in Action #3, to dismiss plaintiff's causes of action against them; (3) the motion by GEORGE SASSOWER, as plaintiff in Action #3, for summary judgment and ancillary relief against the defendant NEW YORK NEWS, INC.; (4) the habeas corpus proceeding (Action #2) instituted by SASSOWER to review his contempt citation by the Surrogate's Court of Suffolk County, and his application for summary judgment with respect to the latter proceeding; (5) the Article 7B proceeding (Action #1) instituted by SASSOWER to stay the Sheriff of Suffolk County from executing a warrant of commitment issued by the Surrogate's Court; and (6) the application by defendants in Action #3 for a consolidation of these three actions, summary judgment in their favor in Action #3, and for a hearing on petitioner's habeas corpus application, and are determined as follows:

The Public Administrator's application for leave to intervene, is denied. While it is true that the moving party's claims against SASSOWER ultimately gave rise to the contempt citation being challenged in the pending habeas corpus proceeding, nonetheless, his interest in the outcome of that proceeding is tenuous at best, and his claims against SASSOWER do not involve questions of law or fact common to the limited legal grounds raised in that proceeding.\* Cf. Tax International Leasing, Inc. v. Overseas Private Investment Corp., 57 AD2d 799; CPLR 1012. In the exercise of discretion, the Court also declines to permit intervention pursuant to CPLR 1013. Moreover, the Public

\*In light of this Court's determination with respect to the Article 7B proceeding, infra, the propriety of intervention in that proceeding need not be addressed.

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SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

BY COWAN J. S. C.

VS.

DATED March 20 19 80  
INDEX 177-119114  
MOTION #153, 154 and 7179  
DATE: 2/20/79 and 5/8/79  
INDEX #78-17671  
MOTION #1700  
DATE: 2/20/79

Administrator's further contention that this Court lacks jurisdiction to review the validity of an Order of the Surrogate's Court of Suffolk County was previously rejected by this Court (McINERNEY, J.), and affirmed by the Appellate Division, Sassower v. Signorelli, 65 AD2d 756.

Defendants SIGNORELLI and SEIDEL's motion to dismiss plaintiff's causes of action against them is granted pursuant to CPLR 3211(a)(7). A complaint purporting to state a cause of action for libel or slander must set forth the actual words complained of (CPLR 3016(a); Escott & Co. v. Alexander and Alexander, Inc., 31 AD2d 791), and mere conclusory allegations such as those comprising plaintiff's complaint are legally insufficient to state a cause of action for libel and slander. Seltzer v. Fields, 20 AD2d 60. Moreover, to the extent that plaintiff's complaint purports to assert a claim for false arrest and malicious prosecution, the moving defendants, as Judges of the Surrogate's Court, are absolutely immune from suit for acts performed within the scope of their judicial functions (Stump v. Sparkman, 435 US 349; Imbler v. Pachtman, 424 US 409; Murray v. Brancato, 290 NY 52), even if such acts are found to have been outside their jurisdiction and are alleged to have been done maliciously or corruptly. Murray, supra, 290 NY at 56.

SASSOWER's application for summary judgment against the NEW YORK NEWS, INC., defendant in Action 13, is denied. The sole basis advanced in support of the requested relief is that the newspaper has, in its answer, allegedly "admitted the publication (Para. 21 of the complaint) of patently defamatory material..." Examination of the pleadings reveals that Para. 21 of the complaint indicates the admission relates solely to a conclusion "that such published material is annexed hereto and marked 'Exhibit 1' and 'Exhibit 2'." Moreover, an examination of the entire pleading makes it clear that defendant had pre-

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MEMORANDUM

31-106N

Form 010

SUPREME COURT, BUFFOLK COUNTY

SPECIAL TERM, PART I

BY *(initials)* J. S. C.

VS.

DATED March 20 19 80  
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MOTION 1154, 154 and 7179  
DATE: 2/20/79 and 5/8/79  
INDEX 178-17671  
MOTION #1700 DATE: 2/20/79

viously denied the falsity of the published material as well as the plaintiff's allegation that its publication constituted gross irresponsibility. Accordingly, plaintiff's further requests for a protective order and for severance of his claim against the NEW YORK NEWS are also denied.

Turning to the petition for a writ of habeas corpus, it is appropriate to survey the events culminating in petitioner's present application. SASSOWER was nominated as Executor in the Will of one, GENE PAUL KELLY, who died on April 26, 1972. The Will was admitted to probate on September 9, 1974, and letters Testamentary were issued to SASSOWER. On November 11, 1974, a petition to compel the Executor to account was filed with the Surrogate's Court. Although the original citation was returnable on December 5, 1974, the return date was ultimately adjourned to March 17, 1975, it appears, because of the difficulties encountered in serving SASSOWER. When the Executor defaulted on that date, the Court issued an Order, requiring him to account on March 27, 1975. When SASSOWER failed to comply with the order to account, by order to show cause made returnable on October 20, 1975, the Surrogate directed him to show cause why he shouldn't be removed as Executor and punished for contempt of court because of his failure to obey the March 27, 1975 direction of that Court. Because of petitioner's repeated applications for adjournment, the matter was submitted to the Court for decision on March 12, 1976, and by Order dated March 25, 1976, SASSOWER was removed as fiduciary and determined to be in contempt of court but was given an additional thirty days to purge himself by filing the account.

On April 15, 1976, SASSOWER filed an accounting for the period of April 26, 1972 to September 9, 1974, and after several further adjournments, the matter was scheduled for

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SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

VS.

BY *(X) WAH* J. S. C.

DATED March 20 19 00

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MOTION 1153, 154 and 7179

DATE: 2/20/79 and 5/8/79

INDEX 1711-17673

MOTION 11700

DATE: 2/20/79

a conference on September 21, 1976. On March 2, 1977, following five further adjournments, several interested parties filed objections to the account. On March 25, 1977, the Surrogate's Court appointed the Public Administrator as temporary administrator and on April 28, 1977, SASSOWER was served in open Court with a written Order directing him to turn over all books, papers and other property pertaining to the Estate to the Public Administrator on or before May 9, 1977. The matter was ultimately set down for trial on June 1, 1977, at which time it became apparent that the former Executor had not complied with the Court's turnover order, and was granted a further adjournment to June 22, 1977, to enable him to comply, having been previously warned by the Surrogate that his failure to do so, would constitute contempt of court. He was explicitly directed to return on June 22, 1977, to enable the Court to determine whether in fact he had complied with the prior Order. When SASSOWER again failed to appear on June 22, 1977, the Surrogate's Court conducted a hearing and determined that SASSOWER's failure to comply with the turnover Order constituted contempt. He was adjudged to be in contempt and sentenced to thirty days in County Jail. On the following day, he was apprehended by deputies from the Suffolk County Sheriff's Office and was remanded to Suffolk County Jail to serve the sentence after he had refused to avail himself of the opportunity to purge himself of the contempt before the Surrogate. On the same day, he obtained a writ of habeas corpus and was released on bail pending the hearing scheduled for the following day. Following that hearing, Special Term granted petitioner's writ and annulled the contempt adjudication without prejudice to commencement of new proceedings. In affirming that determination, the Appellate Division held "that a summary adjudication of contempt is only permitted if the contemtor is

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MEMORANDUM

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SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

BY J. S. C.

VS.

DATED March 20 19 80
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MOTION #1700

DATE: 2/28/79

within the Court's presence (see, Judiciary Law, Sec. 751; Cooke v. United States, 257 US 517). Sasser v. Signorilli, supra at page 747. The Appellate Division noted further, on the same page, that petitioner's successive applications for writs of habeas corpus and bail pending the hearing violated the provisions of CPLR 7002, subdivision c, paragraph 6.

Subsequently, by order to show cause dated January 25, 1978, served personally upon petitioner, further criminal contempt proceedings were commenced on behalf of the Public Administrator for petitioner's continued failure to comply with the Surrogate's April 28, 1977 turnover Order. The moving papers on their face contain the statutory warning concerning possible arrest and imprisonment and in all other respects, comply with the applicable provisions of the Judiciary Law. On February 15, 1978, petitioner filed an affidavit, sworn to on February 2, 1978, in which he stated:

"This affidavit ... constitutes the appearance of your deponent pursuant to the notice appended to the moving papers." (Emphasis supplied).

By means of the same affidavit, petitioner also "entered" a plea of "not guilty" and requested a "plenary trial." On February 22, 1978, the Public Administrator filed a reply affidavit and on the same date, "a notice of calendar disposition" was mailed to petitioner by the Surrogate's Court, notifying him that the proceeding had been transferred to Acting Surrogate Harry E. Seidell, "who adjourned the matter for a hearing, on Tuesday, March 7, 1978, at 2:00 P.M. Acting Surrogate, the Honorable Harry E. Seidell, has directed you personally to appear at said time and date." SASSER again failed to appear on March 7, 1978, for the hearing and it was subsequently held on that date in his absence. Evi-

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Form 818

11-104N

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

BY GOWAN J. S. C.

VS.

DATED March 20 19 80  
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 MOTION #153, 154 and 7179  
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dence was taken and SASSOWER was held in criminal contempt for the second time.

The decretal paragraphs of the Acting Surrogate's Order, dated March 8, 1978, read as follows:

"ORDERED, ADJUDGED AND DETERMINED that the said GEORGE SASSOWER is guilty of a criminal contempt of court by reason of his wilful disobedience of the lawful order of this court made and entered on the 28th day of April 1977, in that he has failed and refused to turn over and deliver to ANTHONY MASTROIANNI, Temporary Administrator of the estate of EUGENE PAUL KELLY, all books, papers and other property of the estate of EUGENE PAUL KELLY, in his possession or under his control, on or before the 5th day of May, 1977, and it is further

ORDERED, ADJUDGED AND DETERMINED, that the conduct of the said GEORGE SASSOWER in failing and refusing to turn over the books, papers and other property of the estate of EUGENE PAUL KELLY was calculated to, and has, defeated, impaired, impeded and prejudiced the rights and remedies of the Temporary Administrator, ANTHONY MASTROIANNI, Public Administrator of Suffolk County, in his administration of the estate and the rights of the beneficiaries of such estate, and it is further

ORDERED, ADJUDGED AND DETERMINED, that the said GEORGE SASSOWER, by reason of and in punishment for such criminal contempt, be imprisoned in the County Jail of the County of Suffolk, New York, for a period of thirty (30) days, unless he shall sooner purge himself of such contempt, and it is further ..."

JUDGE SEIDELL also issued a warrant of commitment directed to the Sheriff of the County of Suffolk, commanding him to take SASSOWER into custody and detain him until judgment and sentence of the Court is satisfied, unless sooner released by further order of the Surrogate's Court. By affidavit dated March 6, 1978, which SASSOWER subsequently stated was not mailed until late in the afternoon of that date and which bears the notation that it was received by the Surrogate's Court on March 8, 1978, petitioner, after challenging the pending proceeding based on unspecified egregious defects (procedural and substantive), informed the Court that he would be actually engaged in another Court

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Form 310

31-106A

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

VS.

BY ~~XXXX~~ J. S. C.

DATED March 20 19 80  
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INDEX 178-17671  
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In Brooklyn, New York, on March 7, 1978, acknowledged receipt of the "notice of calendar disposition" and requested an adjournment of at least five weeks, to permit him to "simultaneously bring on (proper) motions to hold Ernest L. Signorelli and Vincent G. Berger, Jr., in criminal contempt of court for reasons which will be set forth in such papers."

As limited by his supporting memorandum of law, petitioner's principal contention in challenging the validity of the proceedings culminating in his contempt citation and subsequent commitment, is that the procedure followed by the Surrogate's Court deprived him of his constitutionally guaranteed right to be present at all stages of the proceedings and of his additional constitutional and statutory right to allocution before imposition of sentence. In a related vein, he also avers that the proceedings under review does not differ significantly from the procedure followed in his previously annulled adjudication of contempt.

Two categories of criminal contempt are (1) direct contempt, committed in the immediate view and presence of the Court; and (2) constructive contempt, committed outside of the presence of the Court. Direct contempt may be punished summarily "if the acts constituting such contempt are seen or heard by the presiding judge so that he can assert of his own knowledge the facts constituting the contempt in the mandate of commitment." Douglas v. Mel, 269 NY 144, 146-7. However, in the case of constructive contempt, since the Court is unable to state such facts, it is necessary to afford the alleged contemnor the opportunity to be heard upon adequate notice of the charges. Judiciary Law Section 751 expressly recognizes the distinction in the manner of dealing with these two classes of criminal contempt. This categorical concept



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MEMORANDUM

Form 010

31-1064

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

[Redacted area]

VS.

BY GERMAN J. S. C.

DATED March 20 1979  
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INDEX #78-17671  
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of constitutional due process is clearly "intended to protect the right of an accused to appear and defend himself." Spector v. Allen, 281 NY 251.

The first Order of the Surrogate, adjudging the petitioner guilty of criminal contempt was an exercise of the summary power to punish direct contempt pursuant to Judiciary Law Section 750(a)(1). In annulling that determination, both Special Term and the Appellate Division held that a summary adjudication of contempt is not permitted if the allegedly contemptuous acts were not committed within the immediate presence of the Court. The instant order of the Acting Surrogate, again adjudging petitioner to be guilty of criminal contempt, however, does not purport to rest on the summary exercise of the Court's power to punish petitioner. Since the second proceeding did not culminate in a summary adjudication of contempt, the sole question presented by petitioner is whether the notice and opportunity to respond afforded to him comport with due process requirements. This Court finds that they did.

Judiciary Law Section 751(1) requires that a person charged with indirect contempt be notified of the accusation and be afforded a reasonable time to make a defense. (See, also, 22 N.Y.C.R.R. Sec. 701.3). The due process overtones of the statutory scheme simply reflect the law's general disfavor of summary procedure (see, e.g., Sacher v. United States, 343 US 11), and recognition that "(r)easonable notice of a charge and an opportunity to be heard in defense before punishment is basic to our system of jurisprudence." Fernos-Lopez v. United States District Court, 599 F.2d 1087. However, it is recognized that the question of what constitutes sufficient notice of the charges and opportunity to prepare a defense largely depends on the circumstances of the particular case. Spector v. Allen, *supra*; Cipullo v. Warden of City Prison, 11 NY2d 51.

ASH  
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Form 918

31-10-78

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

BY GOWAN

J. S. C.

VS.

DATED March 20 1980  
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In general, "procedural due process" requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." Re Green, 369 US 689, 691-692, citing Re Oliver, 33 US 257, 275. In the instant case, even discounting petitioner's prior history of unparalleled dilatory tactics before the Surrogate's Court, the notice of the pending proceeding, including ample detail of the prior order allegedly violated by him, and the opportunity to prepare and present his defense, clearly satisfies the constitutional and statutory requirements of due process. See, e.g., United States v. Bukowski, 435 F.2d 1094.

Although proceedings to punish criminal contempt have generally been regarded as sui generis and not "criminal prosecutions" (Blackmer v. United States, 264 US 95, 107 (1924)), petitioner correctly notes that "criminal contempt is a crime in every fundamental respect." Bloom v. Illinois, 391 US 194, 201. However, at least in the context of this proceeding, this assertion proves too much.

The constitutional and statutory guarantees of the right of a criminal defendant to be present at all important stages of his trial are designed for the protection of the accused and "[l]ike any constitutional guarantee ... (this right) ... may be waived. Snyder v. Massachusetts, 291 US 97, 106, 54 S.Ct. 310, 78 L.Ed. 674 (1934), even if that waiver is implied from the defendant's conduct, Illinois v. Allen, 397 US 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970). The Supreme Court has long ago held that a defendant who knowingly absents himself from the courtroom during trial "leaves the court free to proceed with trial in like manner and with like effect as if he was present." Giaz v.

AJJ  
MEMORANDUM

J1-J644

Form 81B

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

VS.

BY GOWAN J. S. C.

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United States, 223 US 442, 455, 32 S.Ct. 250, 254, 56 L.Ed. 500 (1912). United

States v. Santoro, 464 F.2d 1202, 1208 (2d Cir.), cert. den., 409 US 1063. The Courts of this State have likewise recognized the waivability of the right of the accused to be present. See, e.g., People v. Epps, 37 NY2d 343; People v. Byrnes, 33 NY2d 343; People v. Bunts, 64 AD2d 283; People v. Huggler, 50 AD2d 471; People v. Thomas, 97 Misc.2d 845; People v. Hicks, 90 Misc.2d 609. The record before this Court contains nothing to warrant disturbing the implicit finding of the acting Surrogate that petitioner's relinquishment of this known right was made knowingly, voluntarily and intelligently, particularly in view of the fact that petitioner is an experienced attorney and counselor at law who cannot, by any shadow, hide behind the charade of being ignorant of the results of his actions.

On the contrary, the record demonstrates the futility, if not perversity, of reaching a contrary conclusion in a case of this nature. Since petitioner, who, as an attorney-fiduciary, must be held to a higher standard than executors who are laymen (Cf. Estate of Kahn, 85 Misc.2d 363), could otherwise evade the power of a court, whose personal and subject matter jurisdiction he does not now challenge, by mere non-appearance and non-compliance with its lawful mandates, there appears to be no sound reason in logic or policy not to accept petitioner's invitation to analogize the challenged proceeding to any ordinary criminal proceeding in which the accused's non-appearance may give rise to an inference of the waiver of his right to be heard.

Petitioner's reliance on his March 6, 1978 affidavit of actual engagement and request for a continuance in an apparent attempt to rebut this finding of waiver is misplaced. As previously noted, the record indicates that this affidavit was received on the day

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Form 118

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM, PART I

By GOWAN J. S. C.

VS.

DATED March 20 1980  
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following the hearing. Since SASSOWER concedes that he mailed his affidavit less than 18 hours before his scheduled appearance, it is difficult to credit his reliance on its efficacy. Moreover, as the Supreme Court has noted, "(t)he matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of request for more time that violates due process even if the party fails to offer evidence ..." Unjar v. Sarafite, 376 US 575, 580.

In this proceeding, the Surrogate's Court was confronted with petitioner's total, continued, steadfast and completely unexplained failure to comply with the lawful mandate of the Court. (1) Rather than reacting to petitioner's flagrant disobedience with the lament of Cicero: "Quo usque tandem abutere ... patientia nostra?" (2), the Court gave him specific notice of the charges against him, provided a reasonable and meaningful opportunity to present his defense or explanation in the context of a plenary hearing, appointed an acting Surrogate to assure an unbiased forum (Bloom v. Illinois, *supra* at US 194, 205), and justifiably interpreted his failure to appear on the hearing date as a voluntary waiver of his right to present evidence. In short, petitioner was afforded all the process that was due.

Accordingly, petitioner's writ is dismissed.

(1) Petitioner has never offered even a semblance of an argument on the merits of the issue before the Surrogate's Court. In addition, this Court notes that the warrant of arrest provided SASSOWER with the opportunity to purge himself of the contempt, which he did not exercise during the four month period between its issuance and execution, nor, indeed, to the present time, almost twenty months after his contempt citation. Petitioner also did not avail himself of the opportunity to vacate the judgment of the sentencing court under the Application provisions of the CPLR and he failed to appear personally before this Court.

(2) "How long do you intend to try our patience?" Cicero, First Oration against Catiline.