

REPLIED,—That the said act of Parliament has been found by the Lords to suspend only such debts as were contracted by the committee of estates, but not those which were only due by the committees of shires; of which last kind this debt now sought is. *Item*, that it is their own fault they are not paid, since in Middleton's Parliament they got a commission for stenting the shire till they were repaid.

DUPLIED, the Lords have made no such distinction of public debts; and that nothing can be imputed to them why they made not use of the said commission, because the said act of Parliament has supervened as *medium impedimentum*; and as it suspends all public debts, so also does it tacitly suspend their commission.

*Advocates' MS. No. 345, folio 136.*

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1672. June 22. KER *against* SCOT of Horsliehill.

ONE Ker pursuing Scot of Horsliehill to make arrested goods forthcoming, the process was casten, in regard the arrester had not called Bell of Belford, his principal debtor, who, if he were cited, might allege the debt to be paid.

*Advocates' MS. No. 346, folio 136.*

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1672. June 22. The TOWN OF DUNDEE *against* The EARL OF FINLATER.

AT this time I got account of an action pursued lately by the town of Dundie, against the Earl of Finlater. The case was, the town having suffered a prisoner to escape, and being convened to pay the debt, there is decret given against them *in foro contradictorio*; whereupon they capitulate with the creditor, and pay him upon this condition, that he pursue the Earl of Finlater as oy and heir to the deceased Earl of Finlater, who was cautioner in the bond; which he condescends to.

It was ALLEGED for Finlater, that he offered him to prove, by the pursuer's oath, that this pursuit was to the behoof of the town of Dundie. Which being granted by him, then he alleged that there could be no process at the town's instance against him, who was only the oy and heir of a cautioner, because what they had paid it was *in pœnam delicti*, whereof they could have no repetition save off the principal debtor, whom they suffered to escape furth of their prison. *Quod a quoquam pœnæ nomine exactum est, id eidem restituere nemo cogitur; pœnæ depensæ repeti non solent; l. 46 D. de regulis juris.* That they are now come in place of the debtor, who could never have pursued him, *ergo*, neither can the town. *Vide etiam l. 203 D. de R. Juris.*

They say that the Lords assoilyied him from the pursuit. I think it was very hard measure.

*Advocates' MS. No. 347, folio 136.*