1710. *June* 13. WILLIAM CARRUTHERS *against* JAMES FINLAYSON.

CARRUTHERS and Finlayson. James Finlayson, merchant in Edinburgh, having lost £60 sterling at cards, with Robert Dundas, collector at Glasgow, he gives him his bill for the same, who indorsed it payable to William Carruthers, chirurgeon in Edinburgh; and he charging, Finlayson gives in a suspension on a double poinding, That, being play-money, he is pursued by the kirk-treasurer to make it forthcoming to the poor, conform to the 14th Act 1621, so that Carruthers could claim no more than 100 merks of it, which he was ready to pay. But he craving his bill to be passed on juratory caution, or such as he could find; the Lords ordained Carruthers, the charger, to depone whether he had the assignation for an onerous cause or not; that, in the first case, the bill should be refused, unless he found sufficient caution. The Ordinary having taken the charger's oath, he deponed he had it for an adequate onerous cause; whereon he passed the bill only upon caution; but the clerk being scrupulous, the caution he offered was rejected, so the bill never came to be expede; and Finlayson's trade calling him to London, Carruthers caused arrest him there; and in regard he found not bail for his claim, he imprisoned him and kept him till Finlayson was forced to pay the sum in the bill, to get liberty to go about his employment; and now gives in a bill to the Lords, complaining that Carruthers had, in contempt of the Lords' authority, incarcerated him during a standing suspension; for though it was not passed yet, there was still a dependance till the Lords had advised his oath, which they never did; and so could not proceed neither here nor elsewhere to execution; and therefore craved he might be fined for his contempt, and refund all his damages; which he instructed by declarations under the hands of my Lord Mayor and Aldermen, with the certificates and affidavits of the prison-keepers and others.

ANSWERED,—There was no manner of contempt, his suspension being fallen and expired more than a year before his attachment at London; for, Carruthers the charger having deponed on the onerous cause, the Ordinary sufficiently advised his oath, by refusing to pass but on caution; which not being found, the bill expired within a month after; and there was no need of bringing the oath to be advised by the whole Lords, more than where a reason is referred to a party's oath present at the bar, and he depones *negativè*: the Ordinary instantly advises that oath without sending it to the Inner-House. And daily practice shows how ridiculous this allegeance is; for, at the time of his imprisonment, there was neither sist of execution, passed bill, nor expede suspension: so what could hinder him to proceed in execution, wherever he found his debtor?

The Lords found a hardship, but could not remeid it, seeing he had neglected to expede his own suspension; and found no dependance, and so no contempt; and refused Finlaylon's bill, and thus assoilyied Mr Carruthers.

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1710. *June* 15. THOMSON *against* JOHNSTON.

DAVIDSON of Ruckan being debtor to one Johnston, wright in Govan; he, discovering a parcel of bark, caused poind it. Thomson, maltman in Glasgow, be-

ing likewise creditor to Davidson, and putting his caption to execution, the messenger makes the king's keys to the doors, and missing the man, he poinds the bark, and carries it away; and Thomson, his employer, sells it for £80 Scots. Johnston, the first poinder, being informed of this, intimates his right, and requires him, by way of instrument, to restore the bark or the price; and, on his refusal, pursues him before the regality of Glasgow for a spuilyie, and obtains a decreet for restitution; which being suspended, Thomson ALLEGED he poinded *bona fide*, knowing nothing of the former; and the bark was said by all the neighbours to be the common debtor Davidson's. *2do*, The first poinding was informal, the execution not bearing that the precept or letters of poinding were publicly read, either at the place where the goods poinded lay, or at the market cross, that the notary, witnesses, and apprisers might know the messenger's warrant; and it wants the oyesses and the offering the goods back; all which my Lord Stair requires, *lib.* 4, *tit.* 47. Next, the bark at a random conjecture is appreciated at thirty-six bolls, whereas, in fungibles, *quæ pondere, numero, et mensura constant*, it should have been measured; and our own law, by the 30th Act Parliament 1686, appoints the same; and therefore the Lords, on the *30th December* 1679, *Hay* against *Hay*, found a poinding of some stacks of corn null, because it was only done by a rip or parcel drawn out of the stack, whereas he should have chosen a skilful caster for proving the corns upon oath; and without this there should be no rule to secure the debtors in poindings, but creditors may take the goods at what rate they please.

ANSWERED,—*Esto* he was ignorant of the prior poinding, and so *bona fide* poinded again, *ergo* he should not restore to him who was *prior tempore* in diligence, is a plain *non sequitur*, and an inconsequential sophism; but the truth is, he knew the house where the goods lay was not the debtor's dwelling, for the first poinder had put them there under his own lock and key; and to search for the rebel there was a mere sham pretence to get access to the bark; and he afterwards changed the lock, and put on a new one, at his own hand, most unwarrantably: all which confirm his knowledge or suspicion. And though they were appreciated by the first poinding to £96, yet he sold them for £80. And, as to the nullities, the execution bore in general the goods were lawfully poinded, which presumed all solemnities necessary: And a poinding being the sentence of a judge, as Sir G. Mackenzie, *tit.* Arrestments and Poinding, tells, How could a messenger rescind, annul, or repel a former complete poinding, seeing *par in parem non habet imperium*, and it should have been first reduced by the sentence of a superior judge? If this were allowed, the diligence of prior creditors might be easily frustrated and evacuated. And, as to the objection that the bark was not measured, the poinding *per aversionem* has ever been sustained; as, in the case of poinding a quantity of iron without weighing it, *19th July* 1675, *Coutts* against *Harper*; and in the poinding of some malt, the Lords found the poinding completed before measuring, *4th December* 1679, *Forrester* against *The Tacksmen of the Excise of Edinburgh*, seeing they were both weighed and measured afterwards: and the quantity of bark is obvious to the sight of the eye. Neither is Hay's case, about the rip of corn, to the purpose, for the place it was pulled out of might be spoiled and wet, and the rest of the stack good, so the apprisers could make no right estimate thereby.

The Lords preferred Johnston, the first poinder; repelled the reasons of suspension, and ordained Thomson to restore; and thought, seeing he had sold

them at an under value, he might be decerned in as much expense as would make up the £96, which was the sum of the first appreciation.

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1710. *June* 30. The Earl of March *against* The Earl of Leven.

The deceased Earl of March having been made governor of the Castle of Edinburgh, in December 1702, during the Queen's pleasure; and the Earl of Leven having obtained another commission to that place in October 1704, and by virtue thereof having uplifted the whole castle-wards and duties belonging to the constable of the castle for the whole year 1704; the present Earl of March, as having right, pursues my Lord Leven, as he who uplifted that whole year, whereas the first half of it clearly belonged to March, he not being exauctorated, nor his commission, till after Whitsunday 1704, was not recalled.

Alleged,—March's commission being *durante beneplacito*, the Queen might dispose her favours as she thought fit; and accordingly, in Leven's new commission, she expressly assigns him to the whole crop 1704, by virtue whereof he has got payment. And the castle rent being allocations of so many chalders of victual payable by some of the crown vassals, by an allocation to that particular use, my Lord Leven's right was before the term of payment of that victual, *viz.* before Christmas, or even Martinmas 1704, and so did fall to him in law, though his gift had not assigned it *per expressum*; and the parallel case was decided on the *23d of June* 1630, *Scrymgeour* against *Denmiln*.

Answered for March,—That these military services do not go by terms, but *de die in diem* for the term they serve. But even on the head of the legal terms he is preferable, seeing his commission was not revoked till after Whitsunday 1704; and so it gave him right to the rents and duties for the first half of that year, just as it does to liferenters and ministers outliving the term: And the contrary would be doubly unreasonable, 1*mo*, That March should be deprived of the salary for the time he actually served; and next, that my Lord Leven should get a salary for the time he has served not: and the customs of all the civilized nations of Europe determine in March's favours; and the Queen's assigning the whole crop 1704 to Leven, must be understood *civiliter*; that her Majesty could not take away the *jus quæsitum* to March, by his commission, installing him in the whole perquisites and emoluments of the castle-dues, aye till it were recalled; and if any thing be procured by subreption or obreption from the prince, [it] can never be interpreted to be their will, but must be regulated by law; and none has so natural a claim to the perquisites of an office as he who served for the same.

The Lords found the Earl of March had right to the first half of the year 1704.

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1710. *July* 1. The Dean of Guild of Edinburgh *against* Cunningham, Duncan, and Wilson, Coupers in Leith.

George Warrender, Dean of Guild of Edinburgh, having convened Cunningham, Duncan, and Wilson, coupers in Leith, and John Wert, smith there, to