1706. *June* 21. CAPTAIN WILLIAM PRESTON, LIEUTENANTS JAMES URQUHART, JOHN MARSHALL, MATTHEW STEWART, and FRANCIS SCOT, *against* The LADY SEMPLE.

IN the pursuit against the Lady Semple, as representing the deceased Brigadier Richard Cuninghame, her husband, at the instance of Captain Preston, and the other officers Lieutenants who served under the said Brigadier, for their shares, conform to the establishment of L.1200 Sterling, appointed to be paid to his regiment by the late King's letter, for their equipage, when called to Flanders in the year 1694, and intromitted with by the Brigadier.

ALLEGED for the defender,—That the pursuers having raised no process for their shares of the said money, during the space of ten years, they ought not to be heard to insist now, after the Brigadier's death, unless they offer to prove *scripto* that they never received payment;—January 11, 1678, Captain Dundas *contra* Holburn. For, in the cases of levy-money, and extraordinary advances made to any regiment, receipts are seldom or never taken from subaltern officers for their proportions. And some actions, founded on writ, prescribe in five years; as arrestments upon bonds or decreets, actions of mails and duties, and for ministers' stipends. Yea, law has confined the necessity of producing discharges of cess and excise to much shorter time. Which short prescriptions are founded on the presumption, that these parties, viz. a master who lives by his rent, a minister who lives by his stipend, and a collector who must pay in to the receiver, will not calmly lie out too long of their money. Now, is it to be imagined, that subaltern officers would fail to claim and receive what belonged to them at the time when it was necessary to equip them, and the superior officers received their due? 2. A division of the foresaid L. 1200 was made by the Brigadier, Lieutenant-Colonel, and Captains, the superior officers, and only proper persons that could make it, which had partly taken effect; and the defender was content to fulfil the same, in so far as it was not already implemented. The establishment could not be the rule for dividing that money, which was not advanced for subsistence and clearances, but for defraying the extraordinary exigencies of the regiment, arising from their transportation to Flanders; viz. arrears unequally due to them, and their equipage and rigging out, which was to some more and some less expensive: but the foresaid cast was duly made, according to the custom of war. 3. The superior officers have got their shares, according to the cast made by themselves; and although a new cast should be made, according to the establishment, the defender, as representing her husband, could only be liable for what he received by the former cast more than his proportion, and not for the overplus of the shares received by the other officers.

ANSWERED for the Pursuers. The decision betwixt Dundas and Holburn doth not meet the case; and it expressly notices that then, in the 1648, it was not usual, as now, for officers to give written receipts. Nor is there any law for a short prescription here. 2. The cast made by the brigadier and the superior officers was arbitrary, collusive, unequal and most injurious to the subalterns. And to shew that no rule of justice was therein observed, ten times more was allotted

to a captain than to a lieutenant: whereas the former's ordinary pay is but about a half more than that of a lieutenant. Nor was the same proportion allowed to all captains; but to some more, and to some less, according to their influence. 3. It is absurd for the defender to fancy that she, as representing her husband, could not be liable for his intromission with the pursuers' money, upon pretence that he gave some part of it away to others; for, by the same rule of reasoning, a robber or a depositary might plead exoneration, as to what they gave away to their associates.

The Lords found the pursuers might still claim their shares of the L.1200, conform to the establishment, as the true and only rule of division; and that the Brigadier was *in mala fide* to make any payments conform to the other cast.

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1706. *June* 26. SIR WILLIAM SHARP of Stoniehill *against* The late ARCHBISHOP of GLASGOW.

SIR WILLIAM SHARP having charged the late Archbishop of Glasgow, to make payment of L.33. 6s. 8d. Sterling, contained in a bond granted by Mr. Robert Mortimer as principal, and him as cautioner, to John Beddel, merchant in London, the charger's cedent; the bishop suspended upon this ground, That the bond charged on is a relative writ, bearing *in gremio* this clause, that if payment be made of the foresaid sum of money, by virtue of a bond English form, signed and sealed by me the principal party, of the date of my subscription, then this obligation shall be null; which clause liberates the cautioner, unless the charger could produce the principal bond to which the Scottish bond relates. For when a bond cannot be produced, *instrumentum penes debitorem,* or which cannot be shown, *præsumitur solutum*; unless there be a clear evidence that it could not be satisfied: as, the term of payment was not come, or some *casus amissionis,* viz. *incendii, rapinæ,* or the like libelled and proved. And the charger was *in mala fide,* to accept of an assignation to the bond after the Scottish form, without getting up the principal English bond, with a conveyance thereto. For as the principal debtor, had he been charged upon the Scottish bond, might have required up that which he signed after the English form, unless it were lost, and the *casus amissionis* condescended on and proved; in which case the principal debtor would have been secured by caution: so this is much more competent to the suspender, his cautioner, who, for want of the principal bond, wants a part of the security he should be assigned to for his relief; seeing the English bond would afford summary diligence and execution in England, which is not allowed on a Scottish bond. But then again the assignee could not discharge the principal English bond; in respect he had no right to it.

ANSWERED for the charger,—The bond charged on is valid and obligatory of itself, without the support of any other writ. 2. The most that in law or reason can be inferred from the above mentioned clause, is, that if the first English bond was paid, the bond charged on is null; which payment must be proved by the