

1684. *February.*M'KEAN *against* M'DOUGALL.

No 34.

Execution
must be spe-
cial as to the
quantities.

JOHN M'KEAN in Backbee, having pursued a spuilzie against Mr John M'Dougall, and it being *alleged*, That the goods were lawfully poinded; *answered*, That the execution of the poinding was null, being only in general terms of the hail corns, cattle, without condescending upon the number and quantities. THE LORDS allowed the defender to adduce the sworn apprisers and taskers who had threschen out the corns and apprised the goods, to prove the quantities of the corns and number of the goods; and in case he did not prove the same, allowed the pursuer his oath *in litem* to prove the quantities and prices of the corns, and number of the goods libelled.

Fol. Dic. v. 2. p. 92. Sir P. Home, MS. No 571.

* * * Harcarse reports this case :

1684. *March.*—The defender, in a process of spuilzie of corns and bestial, having proponed the defence of lawfully poinded;

It was *alleged* for the pursuer, That the appretiation was grossly unjust, in so far as cow and calf were estimated at L. 4. And, *2do*, The corns being apprised by sample, the defender intromitted with the whole stock of the corns, and the quantity is not constituted by the execution; so that the defender ought to prove, by the lot and taskers, what the quantities were, otherwise it ought to be looked on as a spuilzie.

THE LORDS, in respect of the poinding, found not the defender liable in a spuilzie, but ordained him to prove the quantity of the corns poinded by the taskers and tasters to the proof; and he having failed to prove at the day assigned for that effect, the Lords allowed the pursuer *juramentum in litem* as to the quantities and prices.

Harcarse, (SPUILZIE.) No 862. p. 245.

1684. *March.*GOODSIR *against* WEMYSS.

No 35.

A poinding of
plough-goods
was sustained,
unless the
owner would
prove, there
were suffi-
cient other
goods for the
debt and the
rent.

GOODSIR having charged Wemyss for the payment of a debt, and he having suspended upon a reason of compensation, founded upon a decret of spuilzie obtained at his instance against the charger; *answered* for the charger, That the decret of spuilzie being obtained before an inferior court, upon this ground, that the plough-goods were poinded in labouring time, whereas there were corns and other goods upon the ground, which might have been poinded to the value of the debt; it was unjust and unwarrantable, seeing the corns and other goods upon the ground were subject and liable to the master's rent; so that unless it were offered to be proved, that there were as much corns and

other goods upon the ground which might have been poinded for satisfaction of the debt, besides what would have paid the master's rent; he might lawfully poind the plough-goods; and the charger had raised a reduction of the decret upon that reason which he repeated. THE LORDS reduced the decret of spuilzie, unless the suspender would offer to prove, that, by and attour the plough-goods, there were as much corns and other goods upon the ground the time of the poinding that would have satisfied both the master's rent and the debt for which the goods were poinded.

Fol. Dic. v. 2. p. 94. Sir P. Home, MS. No 607.

. Harcarse reports this case :

1684. February.—IN a process of spuilzie, it being *alleged* for the pursuer, to elide the defence of lawfully poinded, That plough-goods were poinded in labouring time, when there were other goods poindable, such as corns.

Answered; The master's rent not being paid, for which the corns were hypothecate *primo loco*, the defender needed not to poind them.

THE LORDS found the answer relevant to elide the spuilzie. Here the tenant was poinding for an extrinsic debt from the sub-tenant, who was obliged to pay the master's rent, and relieve the tenant.

Harcarse, (SPUILZIE.) No 861. p. 245.

. P. Falconer also reports this case :

1684. February 15.—WEMYSS having suspended a debt resting by him to Goodsir, upon a reason of compensation founded upon a decret of spuilzie recovered at Wemyss's instance against the said Goodsir, which decret of spuilzie was recovered upon this ground, That the plough-goods were poinded in labouring time, when there were upon the ground corns and other goods which might have been poinded to the value of the debt; it was *replied*, That Wemyss, at whose instance the decret of spuilzie was recovered, being sub-tacksman to Goodsir the charger, who was principal tacksman of the land, and having poinded the plough-goods for a personal debt, he had, for the ground-duty or rent, an hypothec in the corns and other goods belonging to the sub-tacksman; so that unless it were *alleged*, and could be proved, That beside the labouring goods, there were upon the ground corns and other moveables sufficient to have satisfied both the tack-duty and also the personal debt, (the ground of the poinding) no spuilzie could be sustained. THE LORDS found, That the spuilzie could not be sustained, except it were *alleged* and proved, that by and attour the plough-goods, there were upon the lands the time of the poinding, other goods which were sufficient to pay both the tack-duty and per-

No 35. sonal debt contained in the letters of poinding; and therefore reduced the decret of spuilzie.

P. Falconer, No 83. p. 57.

1684. *November.*

PATRICK and JOHN HAY *against* STRACHAN and The MINISTER of Dunkeld.

No 36.

FOUND that where two persons poind symbolically by rips of corn, the poinding first consummate by casting, threshing, and measuring, though the other was first inchoate by poinding a rip of corn, and an execution of poinding, bearing, that the goods were appraised on the lands, without mentioning the words *on oatb*) was sustained, in respect it bore, that they were appraised at the market-cross upon oath. Here it was debated, if poinding for the master's debt, before the term of payment of the tenant's rent, could be quarrelled by another creditor of the master's; though it might be stopped by the tenant; and if Whitsunday was not a legal term after which one might poind to complete his diligence, though he leave the corns in the tenants hands till the conventional term of Candlemas, as one may take a decret declaratory, to make forthcoming at the term. See No 41. p. 10524.

Fol. Dic. v. 2. p. 95. Harcarse, (POINDING.) No 753. p. 213.

1687. *July 22.* Earl of BREADALBANE, &c. *against* SINCLAIR, &c.

No 37.

THE LORDS advised the action of spuilzie pursued by the Earl of Breadalbane and John Campbell his son, against Sinclair of Dunbaith, Dumbar of Hempriggs, &c. that they had poinded some mares and cows for a debt of Breadalbaine's, though John Campbell had a disposition to them, and appeared at the market-cross of Thurso in Caithness, and offered to depone on the verity of his disposition; which the messenger refused to accept, because, having required him also to depone, whether the said disposition was for onerous causes, (being from a father to his son,) or if it was simulate, only to stop and obviate poindings, he refused to make faith, alleging the messenger had no power to put such interrogatories to parties, but they behoved to be tried in a declarator, reduction, or other ordinary action? THE LORDS found the messenger's refusing to take his oath on the disposition was a spuilzie. But it were fit that the Lords, for clearing the lieges, would determine the point, how far a messenger's power may reach in trying the simulation of all such dispositions produced before them; else all poindings on the production thereof may be stopped. See SPUILZIE.

Fol. Dic. v. 2. p. 93. Fountainball, v. 1. p. 469.