

No. 60.

\* \* \* Sir P. Home reports this case :

William Thin having pursued Francis Scot of Langshaw for the spuilzie of a horse ; alleged for the defender, Absolvitor, because the horse was lawfully poinded, in so far as it was seized upon when the pursuer was carrying corns that were thirled to the defender's mill to be grinded at another mill ; and therefore, conform to the statute of William, Cap. 9. the heritor of a mill or his servants may lawfully seize upon the horse, which is confiscated to the master, and the sack and corn to the miller ; as also, Langshaws had made an act of court, ordaining the horse, in that case, to be confiscated. Answered, That the foresaid statute is in desuetude, as Craig observes, Lib. 2. Dieg. 8. and that our custom doth regard that statute no farther than that the sacks and corn should be cast off the horse, and adjudged to the master, but that the horse itself should be restored to the owner ; and by a decision, the 22d January, 1635, No. 5. p. 1815. *voce* BREVI MANU, the Lords, in that case, sustained that defence only to assoilzie from a spuilzie ; and any act of the defender's court cannot be sustained, being contrary to the law. The Lords restricted the spuilzie to wrongous intromission, and found the defender liable for the price of the horse ; but found that he might lawfully seize upon the corn and sacks that were carrying out of the thirle to be grinded at another mill.

*Sir P. Home MS. v. 1. No. 498.*

\* \* \* P. Falconer's report of this case is No. 12. p. 1820. *voce* BREVI MANU.

1687. July.

LORD GLENURCHY *against* DUMBEATH.

No. 61.

Whether a messenger was guilty of spuilzie who poinded goods, to which a third party showed a disposition, which he refused to swear was not in trust ?

Dumbeath having poinded my Lord Broadalbin's goods, my Lord Glenurchy, his son, compeared at the cross, and offered to make faith, that the goods were his ; and for clearing thereof, produced a disposition and instrument of possession ; but having refused, at the messenger's desire, to depone if the disposition was to his own behoof, or in trust to his father's behoof, the messenger proceeded to the poinding, and the goods were appretiated at a very low and inconsiderable price. My Lord Glenurchy raised a spuilzie upon this ground, That the messenger should have sisted upon the offer to make faith without farther expiscation ; and by custom it is sufficient to send a disposition, though the owner be not present ; his presence to make faith being required where he has no title in writ.

Answered : The sending of a disposition would have sufficed to stop the poinding, had not the pursuer been present, and by his refusal to depone on the trust gave rise to suspicion. *2do*, If mock dispositions in trust, when the haver refuses to depone on the trust, would secure against poinding, then all poinding would be disappointed.

The Lords having considered a probation *hinc inde* before answer, and finding it suspect upon both sides, except as to four of Glenurchy's own horses, which were not contained in the disposition, they found the defender liable in a spuilzie *quoad* these four horses. And not being clear as to the rest of the goods, they appointed a new probation of the true value of the goods poided, without respect to that in the executions, in order to restitution; and delayed to consider if the messenger was punishable for proceeding to poid after the party offered to make faith in manner foresaid. And the Lords were the more tender to find it a spuilzie as to the cows, because it appeared, from a probation led in a reduction of the disposition in favours of the pursuer upon the act 1621, that the property of these cows was not my Lord Glenurchy's, but Broadalbin's.

*Harcarse, (SPUILZIE) p. 245.*

No. 61.

1702. January 22.

JAMES SINCLAIR, brother to Dumbeath, *against* DUNBAR of Hemprigs.

This was an action for a spuilzie of cows, &c. The defence was, Lawfully poided by virtue of a decret of the northern Justiciary against the said James Sinclair for 3000 merks of fine, for convocating the lieges, and invading Hemprigs' tenants, breaking up their houses, tying them with cords, and carrying them and their goods away prisoners. Answered, The poiding was unlawful, being within fifteen days of the charge, which space the 4th act of Parliament 1669 requires; and Stair, Lib. 4. Tit. 47. says, that even where there needs no charge, the days of law after the decret ought to be free from poiding, that parties decerned may in that interval of time either satisfy or suspend. Replied, The act 1669 being a correctory and restrictive law, concerns only personal debts in civil cases, but nowise criminal execution, by way of fine or punishment; seeing a person, being found guilty, may be immediately attached and put in prison, till he pay, and his goods put in custody, which the Roman law calls *annotatio bonorum rei*; and if this be allowed, then much more present poiding; for if they get a charge on fifteen days, ere that elapse they shall drive all their goods to the isles or mountains, and so wholly frustrate and evacuate the poiding. The Lords thought the act 1669 did not regulate criminal procedures; and Sir George Mackenzie, in his notes there, shews cases where a previous charge is not necessary: But the Lords observed, that the decret bore a warrant to charge; *ergo* that ought to have preceded; and the clause for immediate poiding was controverted as interlined; therefore they resolved to hear the cause in their own presence.

No. 62.

Poiding  
without a pre-  
vious charge.

1702. February 19. The spuilzie mentioned 22d January, 1702, between Sinclair and Hemprigs, being debated and advised, the defence was, Lawfully poided by virtue of a decret of the Commissioners of Justiciary for the northern district. Answered, That decret could be no warrant, being arbitrary and inform-