

plied, Non relevat, unless Lawson, the pursuer, offered to prove not only that they were plough-goods in labouring time, but likewise that there were other goods upon the ground belonging to the said Lawson, pursuer, sufficient to pay the debt, and which were either in the poidner's view, or offered to be shewn him, or that he knew thereof. *Duplicated*, Our law hitherto has required no more but to prove, there were other goods at the time on the ground sufficient to pay the poidner's debt, without saying they were shown or offered, or known to him; it being the messenger's duty to search for them; and it were an unaccountable hardship to oblige a debtor (to prevent his plough-goods from being ed) to expose and lay open all his other moveables to rigorous creditors, especially seeing such an offer of compliance might be construed as an homologation of the debt, and a passing from any objections he has against the same. *Triplied*, It were unreasonable to bind creditors-poidners to search all the ground, seeing they may be probably ignorant of the extent and limits of their debtor's land; and it is far more reasonable that the debtor (if he desires to redeem his labouring-beasts) shew and present his other goods; neither will this act, in obedience to law, import any acknowledgment of the debt, or legality of the poinding, or cut him off from any defences against the same. Some thought the debtor obliged to shew his other goods, if he would prevent the poinding of his plough-goods; but it being proposed, what if the messenger searched for other moveables and found none, if this would not be sufficient to liberate the creditor-poidner, even as the messenger's assertion in denouncing of lands to be appraised, that he searched for moveables and found none, is credited? Therefore the LORDS, before answer, ordained the execution of poinding to be produced, to see if it bore any search for other moveables; but, however, the LORDS seemed all clear, that *esto* there were other moveables, and no search for them; yet in this case it would not be found a spuilzie, but only infer simple restitution.

Thereafter Lawson, in a petition, having offered to prove, that, in the same place where they poinded the horses, there were seven milk-kine subjected to their view; and that the messenger and his accomplices, taking a drink at the time, sat down upon sacks of corn belonging to him, and yet poinded none of these, but only his plough-horses; the LORDS allowed him a term to prove this condescendence.

Fol. Dic. v. 2. p. 94. Fountainhall, v. 2. p. 187.

1707. March 11.

Lieutenant-Colonel JOHN ERSKINE of Carnock *against* LADY BETTY BOSWELL,
and L. AUGHINLECK her Husband.

A POINDING of the ground of Kincardine at the instance of Lady Betty Boswell and her husband, for some bygone arrears of an annuity assigned to Lady

No 42.
time, was no spuilzie, but that there must be restitution.

No 43.
A poinding warrantable, although the

No 43.
messenger re-
fused to give
the debtor an
execution be-
fore the
poinding was
completed;
and the tak-
ing of corns
poinded from
tenants with-
out a sworn
metster
found legal,
in respect the
corns were
measured and
delivered by
the tenants
themselves.

Betty by the deceased Countess her mother, was quarrelled by Colonel Erskine the heritor, as unwarrantable, because; 1st, The execution bears, That the messenger, after he had poinded and received from the particular tenants there- in named, several quantities of victual, proceeding to complete the poinding of other corns, refused to give to the Colonel an execution of the poinding, upon pretence, that as yet he knew not the quantity that would be delivered; which was an absurd excuse, considering that there were different poindings from dif- ferent baronies and tenements, upon different days; and Stair's Instit. Lib. 4. Tit. 47. § 33. asserts, That the executor of poinding is bound to offer to the party a copy of the letters and signed executions, that the same may be a sufficient instruction of payment *pro tanto*. 2dly, There was no sworn met- ster or caster chosen by the messenger, as ought to have been done, December 13. 1679, Hay *contra* Hay, No 29. p. 10517.

Answered for Lady Betty and her Husband; the poinding was most regular in so far as, 1st, The messenger promised to give the Colonel an execution whenever the poinding was completed, which he offered when the poinding was over, and till then he could not give it; for how could he condescend on the quantity, before he received it from the tenants. 2dly, There was no ne- cessity for a sworn metster or caster in this case; because the messenger hav- ing poinded the corns by rips, and the meal by samples, the tenants did there- after thresh out their own victual, and willingly brought the species of bear and meal, and met the same to the messenger; and they could expect no metster more favourable than themselves.

THE LORDS found, That the proceeding to poind was warrantable, though an execution was refused till the poinding was completed; and that the taking of the corns delivered and measured by the tenants without a sworn metster or caster was legal.

Fol. Dic. v. 2. p. 92. Forbes, v. 1. p. 140.

1709. June 15.

BALLANTINE *against* WATSON.

No 44.
Growing
corns found
poindable,
though they
were alleged
pars soli, and
not poinda-
ble.

WEIR of Kerse, being debtor to Ballantine of Craigmuir, he registrates his bond, and charges him with horning, and arrests, on the 5th of August, the corns growing on some lands in Newbottle parish, belonging to his wife in life- rent, and so to him *jure mariti*, and by sworn appretiators liquidates them con- form to the quantity of the acres whereon they grew, and took a rip of them to the market cross. Kerse, on the 14th of August, disposes his whole crop of corns to Watsons, his wife's children of a former marriage, as creditors by a bond of provision; and they, by virtue of that disposition, do intromit with the corns and sell them. A competition arising betwixt Craigmuir and them, it was *objected*, that Craigmuir's poinding, being of growing corns yet unripe and