No 43. messenger refused to give the debtor an execution before the poinding was completed; and the taking of corns poinded from tenants without 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; 1*st*, The execution bears, That the messenger, after he had poinded and received from the particular tenants therein 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 different 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*. 2*dly*, There was no sworn metster 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, 1*st*, 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. 2*dly*, There was no necessity for a sworn metster or caster in this case; because the messenger having poinded the corns by rips, and the meal by samples, the tenants did thereafter 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 poindable.

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 liferent, and so to him *jure mariti*, and by sworn appretiators liquidates them conform 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, dispones 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

uncut down, was unprecedented and contrary to law, they being *pars fundi*, and not poindable till they were separate from the ground; neither was there any form or stile for such practice in our law, nor could the quantity and value of it be liquidated, and therefore the disposition, though posterior, ought to be preferred. *Answered*, Growing corns upon the ground could be as well valued and apprised as when they were cut down and stacked in the barn yard, either by measuring the ground, or by trying how much seed was sown upon it; and corns, even before their separation from the ground, are ever reputed moveable, and fall under both executry and escheat, and are not like a *sylva cædua*, which taking a long tract of years before it can be cut for use, does belong to the heir; but corns being among those industrial fruits that are reaped once a year, if he who tilled and sowed the ground die before they be ripe, they fall to his executors, and have been always reckoned *inter mobilia*; and they are as capable of an appretiation and poinding as corns in the barn yard, the form of affecting them being set down by the Lords on the 24th Nov. 1677, Lord Halton, No 26. p. 10515., that they must be casten to the proof by sworn taskers, and so threshen out; and if they exceed the debts, then the surplus must be offered to the debtor. THE LORDS found the arrestment and poinding of the corns, though growing on the ground, legal and warrantable, and preferred it to the disposition; and though Craigmuir might pursue a breach of arrestment and a spuilzie, for their seizing of the corns after he had laid on his arrestment, and so claim violent profits, if he pleased. No 44.

Fol. Dic. v. 2. p. 92. Fountainhall, v. 2. p. 503.

*** A similar decision was pronounced 6th July 1727, Niven against Grieve. See APPENDIX.

1712. *February* 21. ARNOT *against* GREIG.

No 45.
Poinding plough goods before the owner's bear seed was ended, when there were other poindable goods on the ground, found to be a spuilzie, though the labouring had been over 14 days before in the rest of the neighbourhood.

SIR DAVID ARNOT of that ilk, owing some money to one Greig, he came, on the 14th of June 1710, and poinded some horses and oxen. Sir David *alleging* his bear-seed was not ended, he pursues him for a spuilzie, on the 98th act 1503, discharging plough goods to be poinded in labouring time, if there be other goods on the ground able to pay the debt; and which bears analogy to the Mosaical law, Deut. ch. 24. v. 6. prohibiting mill-graith to be taken in pledge, because it is his livelihood; which Grotius, in his critical notes there, accommodates to the case of agriculture; and this is also the Roman law. *Alleged*, The usual time of labouring was then long over, and we are not to consider what a negligent slothful man does, but the common practice in that part of the country; for why should he reap advantage by his sluggishness? *Vigilantibus non dormientibus jura subveniunt.* THE LORDS allowed a probation before answer, of the time of tilling and sowing there that year. And the testi-