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-

No 45. monies coming to be advised this day, it was *alleged* for Sir David, That the spring 1710 being backward, the labouring fell late, and it appeared some ground about was then stirred, but not sown for want of seed. *Answered*, It was evident by the probation, all the country about had done with their labouring by the 1st of June; and the law must not be understood to favour negligent husbandmen, but to mean that plough-goods shall not be poinded so long as the usual season of labouring continues; and this is evident from the reason of the decision marked by Durie, 15th Nov. 1627, Gullan *contra* Drummuir, No 12. p. 10508.; where goods having been poinded in October, and it being *alleged* they were in the plough the day before, the LORDS repelled the allegeance, and found no spuilzie, seeing in that mountainous high-land country, October was not the usual month for ploughing; so we are not so much to notice and consider the debtor's time of labouring, as the season generally used in that part of the country. See also 22d November 1628, Watson *contra* Reid, No 17. p. 10510.; and Stair, B. 1. T. 9. THE LORDS found the tilling of faugh, not to be sown, but to lie lee that year, did not give up the privilege; but thought, seeing Sir David had not ended his labouring that year, it was a spuilzie, though he was somewhat later than his neighbours about him; especially considering it was proven there were stacks in the yard, and corn in the barns, which if poinded might have satisfied the debt, without poinding the labouring goods.

Fol. Dic. v. 2. p. 92. Fountainhall, v. 2. p. 728.

*** Forbes reports this case:

1712. *June* 20.—IN the action of spuilzie at the instance of Sir David Arnot against David and Andrew Greigs; the LORDS found the defenders poinding of the pursuer's plough goods the 15th day of June 1710, before his bear-seed was ended, when there were other poindable goods upon the ground, to be a spuilzie; though the labouring had been over a matter of 14 days before in the rest of the neighbourhood. Albeit it was *alleged* for the defenders, That the act discharging to poind plough goods in the time of labouring, must not be understood of any particular man's unseasonable ploughing, but of the ordinary season of ploughing in such a place of the country, Stair, B. 4. T. 47. § 34; Mackenzie's Observ. on the act 98th, Parl. 6. 1503, November 15th 1627, Gullan against Drummuir, No 12. p. 10508. Seeing otherwise crafty debtors might be designedly slothful in their ploughing, and spin it out till harvest time, thereby to disappoint the lawful diligence of creditors.

In respect it was *answered* for the pursuer, That the defenders citations concern only the poinding plough goods ploughing in mid-summer or October, at upseed time, for faughing or the like; and so come not home to the pursuer's case, whose labouring beasts were poinded, when he was labouring *bona fide* by throwing seed in the ground, in expectation of increase. And as Mackenzie

says, that plough goods may be poinded after the debtor's labouring is over, suppose the neighbourhood be still labouring: Why not, *a pari*, should not the pursuer's goods have been privileged against poinding, till his labouring was finished, though the neighbours about had ended theirs? No 45.

Forbes, p. 600.

1724. *June* 10. & 23.

JOHN GORDON Merchant in Rotterdam, and his FACTOR *against* ROBERT MANDERSTON Merchant in Edinburgh.

No 46.
A poinding was stopped by another creditor producing a disposition to the goods, although remaining in debtor's possession.

MR GORDON being a creditor of Belsches of Tofts, attempted to poind the household plenishing and other moveable effects in the possession of his debtor; but the messenger was stopt by one Craw, as factor for Manderston, who showed a general disposition from Tofts to Mr Manderston of all his moveable goods, dated *anno* 1714.

Mr Gordon insisted against Manderston for payment of his debt, upon the following ground, That the disposition was simulate and fraudulent, Tofts the common debtor having continued in the possession from the year 1714 to the time of the poinding in April 1723.

There was an act before answer pronounced; and at advising the proof it was *pleaded* for the pursuer, That the defender ought to be liable for his debt, it being established by a number of decisions, that such was the effect of stopping of poindings, on pretence of dispositions *retenta possessione*, and that because of the presumed fraud in the disponee, which subjects him to payment of damages to the person defrauded.

It was *answered* for the defender, That though such might be the effect of stopping of poindings upon gratuitous and simulate dispositions, yet where a disposition was granted for an onerous cause, as in the present case, either for payment or security of a just debt, no fraud could be presumed from the disponee's indulgence to the debtor in allowing him to possess; and the disponees afterwards insisting on his claim of property against a creditor who would poind these goods, could not, by any law known with us, subject him to the payment of that creditor's debt. 2*do*, The corns of the crop 1722, and the young cattle could not fall under the defender's disposition in the year 1714. 3*tio*, The Lord's factor, who appeared at the same time with a design to stop the poinding upon account of the hypothec, did thereafter seize and dispose of these very goods; and therefore the defender could not be liable for them. 4*to*, The defender's factor had no special orders to stop the poinding, or produce the disposition.

It was *replied* for the pursuer, That whether the corns or young cattle fell under the defender's disposition or not, yet he was liable, because, under pre-