

No 47. sufficiency left on the ground, as was found in the present case between Mr Crawford of Auchinames, and Sir John Stewart of Allanbank.

Kilkerran, (HYPOTHEC.) No 1. p. 271.

*** See Clerk Home's report of this case, No. 3. p. 6193. *voce* HYPOTHEC.

1750. November 7.

ANDERSON *against* The SHOEMAKERS of the Canongate.

No 48.
A poinding
may be executed a year
after the
charge to
pay.

THE shoemakers of the Canongate poinded the effects of John Anderson, one of their number, and their debtor, who pursued them in a spuilzie, on this, amongst other grounds, that the poinding was more than a year posterior to the charge,

The Lord Ordinary, 15th June 1749, 'Found the poinding was regularly executed; and thereupon sustained the defence of lawfully poinded.'

Pleaded in a reclaiming bill, legal diligence inchoate, if not followed forth within the year, expires: A summons falls if not brought into court; a denunciation is null, if not within that time of the charge.

Answered, It ought to be of no prejudice to the defenders, if this pursuer sequestered his person and effects, so that they could not use diligence sooner; caption may be used after year and day of the denunciation; and so may forthcoming be raised at that distance after the arrestment; and there is no law nor custom limiting the time of using this diligence of poinding.

THE LORDS found there was no foundation for the action of spuilzie, and adhered.

Act. *H. Home.*

Alt. *Lockhart.*

Clerk, *Forbes.*

D. Falconer, v. 2. No 160. p. 1844.

*** Lord Kames reports this case ::

JOHN ANDERSON insisted in a process of spuilzie against the Incorporation of shoemakers. The defence was, lawfully poinded; to which the answer was, That the poinding is null and void, the charge for payment being given in the year 1740, and the poinding was not till the 1745; which, in effect, was poinding without a preceding charge, because a charge falls by the lapse of year and day. This point being controverted by the defenders, it was endeavoured to be made out on the pursuer's part by the following reasoning.

It is a general rule, that no inchoated step of execution does subsist, unless it be followed out within year and day. An execution of a summons falls, if not brought into court within year and day; and even after it is brought into

court, it must be wakened, if there be a discontinuance for year and day. A denunciation upon a charge of horning is, after year and day, null and void; and no clerk will record it. For the same reason, a poinding cannot be executed upon a preceding charge of payment after year and day. And the reason of all is, that if a man do not follow out his inchoated execution within a reasonable time, he is understood to have deserted it, so as to afford security to the persons concerned that they are not further to be distressed; and this regulation, founded on humanity, and contributing to the ease and tranquillity of the lieges, ought to be preserved in perpetual observance.

Decisions are not to be expected upon a point which has not been controverted. One thing is certain, that not one man of business but is well acquainted with this regulation, holding that a charge for payment, as well as a charge of horning, fall, if not followed out within year and day. Spottiswood, tit. Horning, § 1. lays down the rule as follows: 'A person being charged, if year and day pass before intimation, he may not be denounced, otherways the horning is null, and it would seem that the intimation should be upon as many days as the charge.' For what other reason should intimation be necessary, but to awaken the debtor from the security he has by the delay of execution, and to make him prepare for payment? It is the very intendment of a charge of horning, that a party may not be surprised and caught at a disadvantage. Whether intimation be now in use, such as our author talks of, the pursuer cannot take upon him to say; but the authority is equally good whether or not, because still it is unlawful to surprise the debtor, and to take him unprepared; the pursuer ought either to have charged *de novo*, or the former charge intimated to him; which comes to the same.

The defender endeavoured to distinguish betwixt the execution of a summons, which is admitted to fall by lapse of year and day, and a charge of horning or a charge for payment. Many an idle process is brought, which the pursuer may well be supposed to relinquish when he does not prosecute his claim within year and day; but the same presumption cannot obtain where a creditor charges upon a registrate bond or bill.

To this it was answered for the pursuer, That this distinction is without foundation. A pursuer is not presumed to relinquish his cause by delaying to bring it into court for year and day; for he may execute *de novo*. But the true reason is, that the lieges are not to be kept for ever in suspense; it is sufficient, that the party against whom a summons is executed, does attend to the motions of the pursuer for a year and day; after which period the law gives him security till he be roused by a new citation. The reason concludes *a fortiori* to the case of legal execution, which is attended with such consequences, as imprisonment, forfeiture, &c.

It was urged, in the second place, by the defenders, that, after a horning is registered, caption may ensue at any distance of time; and that, after denunciation, poinding may proceed at any distance of time.

No 48.

The first was acknowledged by the pursuer; but, instead of being against him, he *urged*, that it afforded an argument for him; by a registered horning the debtor becomes rebel, and it is in that quality that he suffers imprisonment *in modum pœnæ*; which is so true, that he will not be liberated upon payment of the debt, unless he receive the King's pardon, which is obtained by letters of relaxation. But as for poinding after denunciation, it is doubted whether poinding at all can proceed after denunciation, seeing it is by the creditor's own act and deed that the debtor's moveables are escheated to the king, with the burden of the debt in the horning; the proper step in that case would be to obtain a gift of escheat from the crown. But whatever be in that, no argument can be drawn from it to the present case; for a debtor denounced rebel can have no cause of complaint for a poinding, however late, seeing the goods poinded do not belong to him, but to the king.

'THE LORDS sustained the defence of lawfully poinded; being of opinion, that a charge is a good foundation for a poinding, even after the lapse of year and day.'

The reason which prevailed was, that by the common law poinding did proceed without a charge, and that the act 4th parl. 1669, introducing a charge, does not require the charge to be renewed annually. But the sufficiency of this reason may be doubted. It was certainly a defect in the common law, or rather in our practice, that a poinding could proceed without a preceding notification; for the law of humanity requires, that a debtor be put upon his guard before so strong a step be taken as declaring him rebel, or depriving him of his goods; and, to supply this defect, our legislature made a charge necessary before poinding could proceed; which so far put poinding and denunciation upon the same footing. The statute had no occasion to go further; for the notification once introduced must be subjected to the regulations that govern all notifications, unless the legislature had determined the contrary, which was far from its view.

Rem. Dec. v. 2. No. 117. p. 240.

* * * Kilkerran also reports this case:

In the spuilzie pursued by John Anderson shoemaker, against the Incorporation of shoemakers in Edinburgh, the defence was, legally poinded; to which it was *answered*, That the poinding had not proceeded till upwards of four years after the charge, which was the same as if no charge had been given, as the charge fell by the lapse of year and day.

THE LORDS 'Repelled the objection to the poinding, and found the same to have been regularly executed.'

It is remembered, that the like was found several years ago, though it is not known that the decision is any where marked; and the reason then given was, that before the year 1669, no charge at all was necessary, and there is no law

requiring a charge once given to be renewed. It is at the same time true, that after year and day the party cannot be denounced without intimation, because of the heavy consequences of a denunciation. *Vide* Spotiswood, tit. HORN-ING.

No 48.

Kilkerran, (POINDING.) No 2. p. 404.

1750. February 9.

A. against B.

ON the verbal report of Lord Tinwald Justice-Clerk, it was found, That the apprisers on the ground, and at the cross, ought to be different persons; and therefore, where the same persons, who had appraised sheep and cows upon the ground, were carried along to be, and were the apprisers at the cross, the poinding was found void, but not so as to infer spuilzie or other penal consequences, but only to make the poinder liable for the highest value the goods could be proved to have been worth. See No 51. *infra*.

No 49.

Kilkerran, (POINDING.) No 1. p. 404.

1751. January 4.

ALEXANDER STEWART, against JOHN STEWART.

ALEXANDER STEWART in Mill of Drummachan, gave in a complaint against John Stewart in Dalreoch, for poinding his cattle upon a bill after a sist on a bill of suspension presented by him.

No 50.

Answered, The sist was expired.

Replied, Answers had been given in to the bill of suspension, whereby a dependence was created; and it was unlawful to poind.

THE LORDS found the proceeding to diligence by poinding, while the bill of suspension with the answers given in thereto depended before the Lord Ordinary to be advised, was irregular.

Act. Miller.

Alt. Wedderburn.

D. Falconer, v. 2. No 175. p. 210.

1751. December 6.

GEDDES of Rachan against JAMES MITCHELL.

IN a poinding of a parcel of sheep belonging to James Geddes of Rachan, at the instance of James Mitchell tenant in Castlehill, the same apprisers who had valued them on the ground before carrying away, were employed again to apprise them at Peebles, the head burgh of the shire; after making enquiry and search for the sworn appretiators, and burley men of the town, who could not be found, nor any others proper for that purpose, as the execution bore.

No 51.

A poinding null, where the apprisers at the crop were the same with those on the ground.