

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.

No. 51.

Mr Geddes pursued James Mitchell in a spuilzie, and the Lord Ordinary 14th February 1750, "Sustained the objection made to the poinding, That the apprisers of the goods, when brought to the market-cross, were the same persons who apprised the same upon the ground of the lands from which they were driven; and found the poinding void, and the defender liable for the highest prices of the goods, as they should be proven to have been worth, at the time they were taken off from the ground; but found the defender not liable in the penal consequences of a spuilzie."

Pleaded in a reclaiming bill, There is so strong a custom of executing poindings in this manner, that it might affect too many cases to find them null: It is not easy to say for what reason the double appretiation has been instituted in poindings; possibly the first valueing has been only intended as a rule to the messenger what quantity of goods to carry away, that he might not exceed, and thereby occasion an inconveniency to the debtor; and this notion seems to be favoured by what Lord Stair says, b. 4. tit. 47. § 31. On which supposition there is no necessity that the apprisers should be different.

Answered, It is certain in law there ought to be two apprisings; and if the apprisers are the same, there is really but one: According to the pursuer's notion, there would be no necessity of any apprising on the lands; but so necessary is it, that in the case of ministers poinding for their stipends, it is sufficient without going to the cross, act 21st, parl. 1663. Sufficient indulgence has been allowed to any custom, that the defender has not been subjected to the penal consequences of a spuilzie.

THE LORDS adhered.

Act. *A. Macdowal.*

Alt. *Lockhart.*

D. Falconer, No 244. p. 296.

* * * Kilkerran reports this case :

IN the spuilzie pursued by James Geddes of Rachan against James Mitchell in Castlehill, and John Williamson messenger, their defence being lawfully poinded, the executions were objected to as null, on this ground, that the same persons were the apprisers at the market-cross, who had been apprisers on the ground of the lands.

The Lord Ordinary having advised with the Lords, "Sustained the objection made to the poinding, that the apprisers of the goods when brought to the market-cross, were the same persons who apprised the same, upon the ground of the lands from which they were driven; and found the poinding void, and the defenders liable for the highest prices of the goods, as they shall be proved to have been worth at the time they were taken from off the ground; but found the defenders not liable for the penal consequences of a spuilzie; and allowed a conjunct probation to both parties *prout de jure*, with respect to the foresaid prices of the goods at the time they were taken off the grounds."

On advising bill and answers, the LORDS unanimously "adhered;" and refused to allow a proof before answer upon the usage and custom of messengers, which the defenders prayed for.

No 51

Kilkerran, (POINDING,) No 3. p. 405.

1756. January 27.

ROBERT MURRAY, Tenant in Vogrie, and MORTON his Trustee, *against*
MANSFIELD and Co. Merchants in Edinburgh.

MANSFIELD being creditor to Jackson at Dalkeith, took out diligence, and commenced a poinding of the debtor's shop-goods. As the quantity of these goods made this a work of several days, another creditor, Morton, during the course of the poinding, appeared with his diligence, and offered to poind in the same shop; and being barred by Mansfield, upon pretext that he could not come in upon a poinding already inchoated, Morton's messenger retired, after taking a protest in the following terms: 'That he meant only to poind such part of the debtor's goods as Mansfield had not poinded, and only to conjoin with him in poinding the common's debtor's effects; and therefore protesting, that as he was stopped from doing this, Mansfield should be liable for the debt due to Morton.' After this interruption, Mansfield proceeded to complete his poinding.

THE LORDS were generally of opinion, that this was a deforcement sufficient to infer damages; but it appeared doubtful to what extent. The debt due to Mansfield was large. The debt due to Morton not the fifth part of it. The quantity and value of the goods poinded were distinctly ascertained by Mansfield's execution of poinding; and the doubt was, whether Morton should draw from him the one-half, or only a rateable proportion, respecting the extent of their respective debts. Memorials were appointed to be given in upon this point; and at advising, the reasoning of the Judges was as follows: When debts are conjoined in a poinding, and the same messenger poinds for the several creditors, the property of the subjects poinded belonging in common to the creditors, must be divided amongst them *pro rata*, whether *the ipsa corpora* or the price after a sale. The case is precisely the same as where a man disposes his estate, or certain funds to his creditors for their payment. If there is not sufficiency for paying the whole, the price of the subjects when sold must be divided amongst them *pro rata*. It is upon the same foundation that adjudgers or arresters ranked *pari passu* draw *pro rata*. But two creditors poinding at the same time, in the same shop or warehouse, are in a different state. Each creditor by his own messenger poinding different subjects, they are in the same case as if they were poinding in different corners of the country. There is no common property established, and consequently no place for a rateable distri-

No 52.

A messenger being prevented from poinding by another messenger, the creditor thus excluded was brought in *pari passu* with the other pointer, *pro rata* of the debts.