Pleaded for Mansfield, the creditor in the greater sum; In analogous cases, the division is *pro rata*; as in arrestments used on the same day, and in adjudications led within year and day. No 52.

It is contrary to equity, that a creditor for a small sum should receive full payment of his debt, when another, for a great sum, and equally forward in diligence, does not draw above one-tenth part of his.

Besides, when a messenger poinds for two creditors, the produce of the pointing is divided according to the debts. Now, here Meek desired only to be conjoined in the poinding; and, consequently, only desired that the produce of the poinding should be divided according to the debts.

The Lords found, that the division must be *pro rata*, according to the amount of the respective debts, in the same manner as if the parties had been conjoined in the poinding.

Act. *M'Queen.* Alt. *Lockhart.* Clerk, *Gibson.*

Fac. Col. No 179. p. 266.

1769. *January* 25.

Robert Steven, &c. Trustees for the Creditors of Alexander Arbuthnot, *against* John Craich and James Mitchel.

No 53.
A messenger who, without letters of open doors, had removed trees which served as a barricade to the door of a wood yard, and so made entry and poinded, was assoilzied from reduction of the poinding.

Alexander Arbuthnot, merchant in Montrose, possessed a timber-yard in the links of Montrose, inclosed on one side by close sheds for workmen, and on the other three by a pailing of wood from six to eight feet high, with an opening of about two inches between the rails or stakes. On the north-west side there were a gate and a small door, the usual entries to this wood-yard, secured by locks; on the south-west side there was another large gate for the purpose of receiving timber and carriages from the sea-side, made of paling like the rest of the inclosure, without lock or bands, but secured on the inside by three trees, of 12 to 14 feet long, the greater ends of which were fixed or rested against the ground, and the smaller ends against the back or upper cross-bar of the gate.

Charles Thomson, a messenger employed by Craich and some others, finding the gate and door on the north-west side locked and secured, without application for letters of open doors, poinded and carried off the wood in the yard, by removing, on the outside, the trees that supported the south-west gate.

In their action for reduction of the execution of the poinding, it was *pleaded* for the pursuers, That, in every step of diligence, there is a special warrant, pointing out what the party may do upon it, and that he must be restricted by the authority of his warrant. The diligence of the defenders entitled them to poind the effects of their debtor, provided they could come at them in a regular manner, but did not authorise them, without letters of open doors, to break into his house or inclosures, to lay hold of those effects. In no case whatever can a door, locked or secured in such a way as to exclude indifferent persons from access without violence, be opened by a messenger, in virtue of a horning or simple warrant to poind. Letters of open doors, which mention a

No 53. dwelling-house and lock-fast doors, are not solely intended to prevent a forcible entry into the dwelling-houses of debtors, as being a sort of sanctuary; if the goods are within close doors, there is no distinction whether the goods are in a dwelling, or in a stable, a park, or any other inclosure, providing they are so secured, that the messenger cannot get at them, without forcing open a door. The usual stile in captions, 'steiked and lock-fast places,' applies not only to those that are locked, but to those that are steiked, or shut in such a manner as that the messenger cannot enter by the common door. The plain sense of the law is this, that a messenger, having a warrant to poind, must not enter clandestinely or violently; he must not get in at the window, or climb over the wall, but must enter fairly and directly as other people do; and, if an outer door is secured, so as not to be opened without violence, he cannot legally force his way, whether such door or gate is secured by a lock, by a bar, or by trees, as in the present case, placed against it in the inside, by way of barricade.

Answered for the defenders; That though the origin of letters of open doors, or the particular circumstances in which these are requisite, are not clearly set forth in the law-books, it is a general principle of law, that a creditor may poind his debtor's effects wherever he can find them. The distinction between personal and real diligence is to be found in the letters themselves. 'The will 'of a caption, as observed by Lord Bankton, B. 4. T. 41. § 8. is to break open 'doors, and to make the King's keys; but, in poindings, the messenger can-'not forcibly enter, without letters for making patent doors; but, if he get 'entrance, he may break open chests, cabinets, or chambers, in order to dis-'trinzie the goods therein.' This restriction in executing real diligence, gives a sort of protection or privilege of sanctuary to the domicil of the party; but the command in letters of open doors, 'that, if needs be, ye make steiket and 'lock-fast houses, yates, and doors, open and patent,' would seem to import, that it was the party's dwelling-house, for the security of which this protection was intended; so that the messenger, if he found them locked, should not be at liberty, by his own authority, to break open the same, but to borrow the King's keys, by letters for making open doors.

But, whatever might be the case with regard to houses, otherwise fenced and secured, than by locked doors, it is impossible to consider a timber-yard, fenced and inclosed as Mr Arbuthnot's was, to be of such a nature, as that letters of open doors should be necessary to authorise the entry of a messenger, in order to execute the diligence of the law.

The facility with which the messenger got entry, shows, that the gate was not so secured as to require letters for open doors, since it would have been no ways faulty to have opened the latchet or sneck of a dwelling-house, without the aid of the King's letters.

Memorials having been ordered, with regard to the practice in poindings in similar cases, the following instances were produced by the pursuers; that, at a poinding of cattle at a park of Brucehill in 1765, the messenger obtained

letters of open doors, not being able to get access by reason of steiked and lock-fast doors; that a messenger, in poinding corn in a barn-yard, about 34 years ago, entered to the yard by stile or steps, the gate of the yard being padlocked; that he took out rips or samples of corn; but, before the corns themselves were taken away, letters of open doors were obtained; that it appeared from the signet-records, that seven letters of open doors had been issued from August 1765, to June 1766, relative to opening shops, cellars, office-houses, a lime or coach-house, and chests or casements. No 53.

The defenders, though they acknowledged they had not discovered any case precisely similar, averred, that the most reputable messengers had agreed that they would not have hesitated to execute this poinding, in the way and manner it was done, without letters of open doors; that it is their practice, in executions of poinding, to enter into any place to which they have access without violence, or breaking open steiked or lock-fast doors; and that, though the door, by which they mean to enter, be shut, but not locked, if the impediment which keeps it close can be removed, without breaking or demolishing the door, such impediment is not considered as requiring letters of open doors.

The Lords sustained the defence against this action, and assoilzied the defenders; and, upon a reclaiming petition, adhered.

Act. *Rae.* Alt. *Lockhart.* Clerk, *Ross.*

P. C. *Fol. Dic. v. 4. p. 82.* *Fac. Col. No 86. p. 152.*

1773. *February.*

No 54.

Found, that a poinding on an act of warding might be executed more than a year after the charge.——See Appendix.

Fol. Dic. v. 4. p. 81.

1775. *August 4.* Daniel Mitchell *against* William Gillies.

No 55.

In an action of restitution at the instance of a prior against a subsequent poinder of a tenant's stocking, which, it was proved, were, soon after the first poinding, returned into the possession of the debtor, who continued in the farm as formerly, apparently tenant of the farm, and owner of the stocking, though the pursuer alleged there was a written agreement as to both between the debtor and him, which, however, he could not produce, alleging it was lost; and, where the *fama consentiens vicinii*, that this was a contrivance, by poinding on a fictitious bill, to disappoint the defender, and the tenant's other creditors, was fortified by the proof led; and the Court being of opinion, that, in those circumstances, poinding, which is a legal disposition, could have no stronger effect than a voluntary one, *retenta possessione*;

The Lords assoilzied the defender.

Act. *Geo. Buchan-Hepburn.* Alt. *M'Laurin.* Clerk, *Pringle.*

Fac. Col. No 193. p. 126.