

1624. *March 24.*SYM *against* AMBROSE.

THE Lords find an exception of restitution of the goods within 48 hours, and the pursuer's receiving of them back again, relevant against a spuilzie.

No. 37.

Clerk, *Durie.**Fol. Dic. v. 2. p. 390. Nicolson MS. p. 393.*1630. *November 9.*BROWN *against* LAMB.

ONE Lamb, officer, having poinded goods at Andrew Livingston's instance, as pertaining to Brown for debt owing by Brown to Livingston, and at the time of the poinding, Brown pursuer of the spuilzie compearing, and offering to make faith, that the goods pertained to him, and not to the other Brown, against whom the poinding was executed, notwithstanding whereof the Officer poinded; who being therefore convened for spuilzie thereof, he alleged, that the pursuer's self, immediately after the poinding, the morn thereafter, intromitted with the goods; by the which intromission, after the alleged spuilzie, the Officer ought to be liberated of any spuilzie; seeing it is neither libelled nor can be alleged, that the Officer, after the time of the pursuer's intromission, ever meddled with the goods, or did any act to prejudice the pursuer thereanent;—and the pursuer replying, that that intromission was both momentaneous and ineffectual to him, seeing Livingston, at whose instance the poinding was led, within 48 hours after the pursuer's intromission, took back again the said goods, and disposed thereupon; which being done by him, in respect of the foresaid alleged poinding unjustly, first done by the Officer who proceeded, notwithstanding of the pursuer's compearing to make faith therefore, the exception ought to be repelled;—the Lords repelled the exception in respect of the reply; for they found, that the Officer having done once wrong, by poinding of another man's goods, who offered to make faith, he was not freed of that wrong by the party's subsequent intromission, and which being momentaneous, and made ineffectual by the creditor's intromission thereafter, albeit no deed was done thereafter by the Officer, yet that the first wrong of poinding was not found purged; but the said poinding being the ground of the creditor's taking away again of the goods from the pursuer, the said away-taking depending upon that deed of the Officer, was sustained to maintain the spuilzie against the said Officer, seeing he had also, after the spuilzie, received from the creditor a discharge, upon the receipt from him of the said goods poinded.

No. 38.

A messenger having poinded goods wrongously, it was no defence, that the proprietor had re-apprehended them.

Act. *Stuart.*Alt. *Mowat et Dunlop.*Clerk, *Hay.**Fol. Dic. v. 2. p. 390. Durie, p. 537.*