

No 30.

*ratim* relevant, viz. that the goods libelled were in the possession of from whom they were poinded, who did not concur in the pursuit ; 2do, That the defender offered to prove, that there was sufficiency of labouring goods left for labouring the pursuer's mailing, and that the ploughs were left going ; but the LORDS, for clearing the matter of fact, appointed a conjunct probation before answer.

*Fol. Dic. v. 2. p. 94. P. Falconer, No 31. p. 16.*

\* \* \* Harcarse reports this case :

1682. *March.*—It being *alleged* against a spuilzie of goods, in the labouring time, That there was a sufficient number left behind for the labouring, and that the pursuer having parted with some part of the lands, and not put off any of the goods the time of the poinding :

THE LORDS repelled the defence, because there being other goods and corns in view, the defender should have spared the labouring goods. But thereafter, in November 1682, betwixt the same parties, the LORDS sustained this defence to exclude the spuilzie, that the time a sufficient number of goods, more than was necessary for the labouring, was left.

*Harcarse, (SPUILZIE.) No 857. p. 244.*

1683. *March.*KEITH *against* WILLIAM PATON Merchant.

No 31.  
Whether a  
transaction,  
with a view  
to settle the  
debt, ought  
to stop a  
poinding?

A CREDITOR being about to poind, entered in a communing with the debtor's wife, (himself being out of the way for fear of caption) who gave the creditor a bond due to her husband ; but he resolved to try the sufficiency of the debtor in the bond, before he would take it off for payment ; and upon trial returned the bond to the wife, and then immediately executed his poinding. The debtor whose goods were poinded, did thereupon raise an action of spuilzie, upon this ground, That the poinding was executed before the treaty of communing was fairly given up, whereas it should have been delayed for some short time after the communing blew up, that the debtor might have taken some other course for satisfying the debt, and preventing the poinding ; which is prejudicial and destructive to a merchant.

*Answered ;* That a friend of the debtor's having signified his willingness to make over to the creditor the right of a bond, in satisfaction of what was owing him, who remitted to his writer to expiscate the condition of the debtor in the offered bond, and he having reported that the bond was not sufficient, the creditor was not obliged to stop execution of the poinding, and allow the debtor an opportunity to pack up his goods ; especially the defender being informed, that the pursuer had made a disposition of all his goods to other creditors, or persons in trust.

THE LORDS, before answer, allowed the pursuer and his wife to depone upon the quantity and value of the goods poinded, (in respect it was alleged, that some goods were taken away that were not contained in the execution of poinding) reserving the modification of all to the Lords.

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*Harcarse, (POINDING.) No 751. p. 212.*

1683. *March.*

IRVIN of Hilton *against* The FACTOR of the COLLEGE of ABERDEEN.

THE exception of lawful poinding in a spuilzie being offered to be taken off by an allegiance, that labouring goods were poinded in labouring time; and it being proven, that the usual time of labouring about Aberdeen was after Michaelmas, the 29th September, and the poinding was executed on the 28th, when some of the neighbours had stricken plough, but the pursuer had not begun to till;

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THE LORDS found, That the poinding was not in labouring time, though some of the country had begun to till. And some of the LORDS were of opinion, that the goods might have been lawfully poinded, even after the 1st of October, though other neighbours had begun to till, unless the poinded goods had been once yoked that year.

*Fol. Dic. v. 2. p. 95. Harcarse, (SPUILZIE.) No 859. p. 244.*

1684. *January.*

JOHN MAUL and Sir JAMES HAY *against* MARGARET HAY.

FOUND that where stacks in yards, or wine in cellars are poinded by symbols, though the execution bear, that the whole quantities were poinded, it is only effectual in so far as may answer to the ground of the poinding; and the superplus doth not belong to the pointer, but he is liable to the other creditors for the value thereof, unless the subject be *unicum corpus*, as a horse, or piece of coin that could not be conveniently divided. And the other creditors may point the superplus goods after the ground of the first poinding is satisfied. And found, that a creditor who had a warrant for poinding, not having made use thereof, but only arrested in the first pointer's hands, a third creditor poinding after the arrestment, was preferable to the arrester, as having used the more habile diligence. For the property of the superplus not being in the person of the first pointer by symbol, he could not be debtor therefor, and so the arrestment took no effect; especially the goods having never been altered or removed out of the common debtor's cellar.

No 33.

*Harcarse, (POINDING.) No 752. p. 212.*