

No 18.

company and their servant, and his applying it to his own use was a *species furti*; and if he by his wilfulness in keeping up the money, has brought himself into the briers, *sibi imputet*; for law says, *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire*.—THE LORDS found the charge in this case might warrantably proceed on six days, and therefore refused the desire of Mr Balfour's bill, but allowed him to suspend and relax, having now made payment.

Fol. Dic. v. 1. p. 466. Fountainhall, v. 2. p. 313.

No 19.

1710. July 29.

FAIRHOLM against M'KENZIE.

WHEN tutors and curators are cited edictally in a process against a minor, though they be out of the country at the time, there is no necessity that they be cited upon 60 days and 15 days; and the minor will not be indulged farther than the common *induciæ legales*.

Fol. Dic. v. 1. p. 465. Forbes.

* * * This case is No 41. p. 3709. *voce* EXECUTION.

No 20.

1732. December.

FULLERTONS against HUME of Slate-house.

A DECREE of certification, in a reduction and improbation, was recalled upon the 20th article of the regulations 1695, which requires that certificates in absence shall remain unextracted for the space of four weeks after pronouncing. Here it was understood to be in absence, a procurator being marked by the clerk at random, who was not the defender's ordinary procurator. See APPENDIX.

Fol. Dic. v. 1. p. 467.

1735. December 18.

M'QUEEN against STIRLING of Keir.

No 21.

An heritor poiding upon a baron-decree for bygone rent, need not wait the lapse of the ordinary number of days, but may proceed *instanter*.

UPON the 19th of September 1734, Keir took a decret before his baron-court against M'Queen his tenant, whereby he was decerned to make payment to him of a certain sum, as bygone rents, 'within the term of law;' and, in virtue thereof, Keir poided his effects on the 24th of the said month, whereupon M'Queen brought an action of spulzie, against which the defence offered was, lawfully poided.

Answered for the pursuer; That his goods were carried away before the term of law, within which he was charged to pay, was expired.

Keir *replied*, That anciently a custom prevailed of poiding instantly after obtaining decret, either without any charge at all, or before the days were ex-

pired, not only for tenants' rests, but likewise for all personal debts, which being deemed a hardship, gave rise to the act 4th, Parl. 1669, whereby it is enacted, 'That it should not thereafter be lawful to poid moveables upon decreets for personal debts, while the parties be first charged, and the days of the charge be expired.' And then it is added, 'But prejudice always of any decreets, recovered at the instance of heritors against their tenants in their own court, whereupon it shall be lawful to them to use poiding as formerly.' Which act is not only a proof that the old custom of poiding upon baron-decreets was precisely as he pleads it; but it likewise imports an approbation of that privilege which heritors had been so long in possession of; therefore it was lawful for him to poid immediately after the decret; neither can the discerning M:Queen to pay within the term of law, make any variation, seeing that means nothing else but the time when a decret may be put to execution, which cannot be fixed to any precise number of days, but must vary according to the nature of the decret on which execution is to proceed. Thus, in charges on decrees before the Court of Session, the term of law is fifteen days; but upon decrees of registration of bills, it is only six; and, on baron-decrees, it is *instanter*, because they may be put immediately to execution; so that granting he had charged upon a precise number of days, and poided before they had expired, it is believed the above statute would have warranted him in so doing.

Duplied for the pursuer; That no sentence upon a personal debt can be executed until a certain space, determined by law, be elapsed; which, with us being fifteen days (except where a shorter time is specified), all executions within that period are illegal. And this is founded not only on the principles of natural equity, that require an indulgence of some time betwixt the pronouncing and executing a sentence, but likewise in the above statute: It is true, that it contains an exception of decreets recovered by heritors against their tenants in their own courts, upon which it is declared, that poiding may be lawfully used as formerly; the meaning whereof is not to allow heritors the privilege of executing the sentences of their own courts without abiding any term, but only to declare that such sentences may be executed without a formal antecedent charge, conform to the custom in other courts; which is very reasonable, considering that the officers thereof are not presumed so skilled in matters of form as they are in other courts. And, that this was understood to be the meaning of the law at the time it was made, is plain from Lord Stair, B. 4. T. 47. § 29. where he says, That in all decreets, as well those of baron-courts as others, there ought to intervene fifteen days betwixt the pronouncing the decret and the execution thereof, that in the mean time parties may either pay or apply for a suspension. Besides, it is very extraordinary to suppose the law should indulge such a privilege to baron-courts, where there is more opportunity of oppressing poor people than in any other; especially as no good reason can be given why tenants, who, by law, are entitled to many privileges, should not have the legal *inducia*, which is competent to the rest of the subjects.

No 21.

But, in the *second* place, whatever is the privilege of baron-decreets, it cannot be extended to this case; seeing, by the decret, he was expressly ordained to make payment within the term of law; whereby he had reason to believe, that provided he paid within fifteen days, he was safe from all execution; notwithstanding of which his effects were carried off within that period; and the construction put upon the decret by the defender, is inconsistent with common language, as the term of law is always supposed to imply a certain number of free days.

Triplied; That, before the statute 1669, poindings, in all cases, proceeded summarily without the necessity of a charge, and even where a horning was raised and executed before the days thereof expired, as is observed both by Balfour, in his Practiques, and Sir George Mackenzie, in his observations on this statute. Besides, the act 1469, ch. 34. which prorogates the poindings for rents due at Whitsunday and Martinmas, to the third day after those terms, in respect the poinding at the term day occasioned a profanation thereof (both which were then holidays), is a demonstration that poinding was then competent immediately after decret; nay, it has been found, that in matters which do not concern poindings, the law stands upon the same footing it did before the act 1669. Thus, a decret of removing before an inferior court may be put to execution by ejection immediately after it is pronounced; and, if the law stood so before the act, the defender has done nothing wrong, seeing, at the same time that the statute discharges poinding for personal debts until the days of the charge be expired, it expressly excepts decreets recovered at the instance of heritors against their tenants in their own courts. As to the passage quoted from Lord Stair, it is at best very ambiguous and inaccurately expressed. In the *second* place, the defender cannot admit the gloss that is put on the decret, namely, that it imports the same thing as if the pursuer should pay within fifteen days, seeing the term of law, in its proper, as well as its legal sense, signifies the term within which execution may be awarded, and therefore cannot be understood to give any other *inducie* than were allowed by law in this particular case.

THE LORDS repelled the objection to the poinding, and assoilzied.

Fol. Dic. v. 1. p. 466. C. Home, No 5. p. 15.

1761. July 17.

ROBERT HAMILTON of Boutreehill, *against* ALEXANDER BLACKWOOD,
Merchant in Edinburgh.

No 22.
Second diet
of compar-
ance in a se-
cond process
of adjudica-

ALEXANDER BLACKWOOD was creditor to Cathcart and Blackwood, merchants in London, who became bankrupt in 1745, and obtained a certificate of bankruptcy. It was afterwards discovered that there was an heritable subject in