1663. *January* 8. MURRAY of Merstoun *against* HUNTER.

No 281.
A precept of poinding being unwarrantably executed *extra territorium*, found not sufficient to infer spuilzie against the employer, unless it were proved, that the messenger had express orders from him.

MURRAY of Merston pursues Thomas Hunter for a spuilzie of malt, who *alleged*, That as to that member of the libel of the spuilzie of the malt, by the defender's hunding out, or command, it is only relevant *scripto vel juramento*. The pursuer *answered*, That she qualified the probation thus, that the defender intrusted a messenger, or officer, to execute a precept of poinding, by delivering him the precept, and therefore the precept, with the execution thereupon, is sufficient probation. The defender *answered*, That the same is not sufficient; because the officer executed the precept *extra territorium*, whereby it became a spuilzie, which ought not to be imputed to the defender, unless it were offered to be proved, that he ordained the officer to poind this malt without the jurisdiction, and that only *scripto vel juramento*. The pursuer *answered*, That as the giving of a precept of sasine is a sufficient warrant, without any other procuratory, whatever the effect of the sasine be, so must the delivery of the precept of poinding be sufficient to instruct the warrant, or command to poind, wherever the poinding was executed, and the user of the poinding should be liable to the deeds done by the person he intrusts; especially, seeing not only the messenger was sent, but other servants, and messengers, employed by the user of the poinding.

THE LORDS found the giving of the precept of poinding to the messenger, and his unwarrantable poinding *extra territorium* not sufficient only, but found it relevant to prove by the messenger, and defender's servants employed by him, their oaths, that they were commanded to poind this malt, or other goods, in this place, being *extra territorium*. See PROOF.

Fol. Dic. v. 2. *p.* 159. *Stair, v.* 1. *p.* 153.

SECT. VI.

Soldier acting as of a Party in Arms.

1664 *June* 25. FARQUHARSON *against* GARDINER.

No 282.
To give the benefit of indemnity to a soldier, mandate was presumed, if he

MR JAMES FARQUHARSON having obtained a decreet of spuilzie against John Gardiner and others, Gardiner suspends on this reason, that he meddled with the goods in question, as a soldier in a party in arms, being then in the regiment of the Master of Forbes, under the command of the Earl of Middleton,

No 282.
proved he acted with a party in war.

and therefore is freed by the act of indemnity. The charger *answered*, That he oppones the act indemnifying only those who acted by warrant of any committee of estates, or commander, or other authority, so that it is not relevant, unless the suspender allege, that as he was a soldier in arms, so he had such warrant, and did apply the particulars to the public use, under which he served; and it is offered to be proved, that he took the goods libelled to his own house, and made use of them to his private use. The suspender *answered*, That this reason stands relevant as proponed, because it is clear by the act of indemnity, that all things done under any pretended authority or command, are indemnified; and therefore there is a special exception of private thefts and robberies, which confirms the rule as to public pillaging in any war; and if there were a necessity to every person to instruct the command or warrant of his officer, which was not accustomed to be in writ, the whole act would be elusory; so that it is sufficient, that the thing was done in the way of a public war; otherwise, all that was taken or converted to private use, of those that were either with Montrose or Glencairn, might lie open to pursuits, notwithstanding of the act of indemnity.

The Lords, after serious consideration of this, as a leading case, found the reason of suspension relevant, that the defender needed not to prove that he had warrant, but that the warrant was presumed, if he proved he acted with a party in war, against which they would admit no contrary probation, unless it were offered to be proved by the defender's own oath, that he had, without any warrant, converted the goods to his own private use.

Fol. Dic. v. 2. *p.* 160. *Stair, v.* 1. *p.* 207.

*** Gilmour reports this case:

1664. *June* 24.—There being a decreet of wrongous intromission recovered at the instance of Mr James Farquharson against John Gardiner and others, for diverse goods alleged spuilzied the time of the troubles, reduction was intented thereof, upon a reason founded upon the act of indemnity. To which it was *answered*, That the act of indemnity can defend none who spuilzied goods, without an order from some superior officer, and these pursuers of this reduction cannot allege any such order. It was *replied*, That the pursuers being soldiers under command for the time, must be presumed to have meddled with the goods by an order; especially, seeing they offered to prove, that they were under the command of the Master of Forbes, who keeped a garrison in the North, for whose use they meddled with the goods; and after so many years, 17 or 18, they cannot be obliged to prove an order; orders at that time being, for the most part, verbal.

The Lords sustained the reason of reduction, unless the defender offer to prove by the pursuer's oath, That what he did anent the taking away the goods, he did it without order.

2 *Gilmour, No* 108. *p.* 80.