

1698. February 15. SMETON and HEPBURN against Bailie BRAND.

No 40.

PHILIPHAUGH reported Smeton, Hepburn, and Bailie Brand. It was an objection against the formality of the poinding of a copper cauldron, that it was not carried to the market-cross to be appretiate there. *Alleged*, They had done the equivalent, in carrying a symbol, and a part of itself viz. its ledges to the cross; and in such bulky moveables that is sufficient, as in a salt-pan, the symbol is a nail or two of it; in hangings, one piece is sufficient for the whole. Yet the symbol is not always homogeneous, for a wisp of straw, as their food, serves for a flock of sheep. THE LORDS found the poinding lawful, the symbol being proved to have been adhibited.

Fol. Dic. v. 2. p. 92. Fountainhall, v. 1. p. 824.

1698. December 22. CATHCART against PATON.

No 41.

Found contrary to Hays against Strachan, No 36. p. 10522., as to inchoate poinding.

THERE is a competition betwixt Thomas Cathcart, Bailie of Ayr, and Mr Robert Paton minister at Barnwell, about the corns of one Reid their debtor. Cathcart poinded the corns standing in the stooks in August and September 1698, and carried a rip of them to the market-cross. Paton, for his year's stipend and some preceding rests, poinds them ere they be threshen, and carries away as much as will answer the teind; and *alleged*, The first poinding not being completed by casting the corns to a proof, there was nothing to impede him from poinding them again for his stipend, seeing *decimæ debentur parochæ*. *Answered* for Cathcart, This was a plain spuilzie, seeing the property of the corns was fully conveyed by my poinding prior to yours, and I could do no more. *Replied*, Your inchoate diligence could never hinder me to poind; neither was there any thing intimated to put me *in mala fide*, and my debt is privileged, being *debitum fructuum*. THE LORDS found no spuilzie, but that the minister had right to retain, in so far as extended to Reid the common debtor his propotion of a year's stipend, but not for any bygones preceding, and that he must restore the superplus.

Fol. Dic. v. 2. p. 95. Fountainhall, v. 2. p. 28.

1703. July 20. THOMAS LAWSON against ROBERT BROWN of Bishoptoun.

No 42.

Found that altho' there were other goods, and no search for them, yet a poinding of plough-goods, in labouring

LAWSON being debtor to Bishoptoun in a sum of money, he poinds some horses. Lawson raises a summons of spuilzie. The defence proponed was, Lawfully poinded. *Answered*, They were plough-goods in labouring time, and so by the 98th act 1503 were not poindable, the instruments of agriculture being exempted from legal execution, both by the Mosaical law and the Roman. *Re-*

plied, Non relevat, unless Lawson, the pursuer, offered to prove not only that they were plough-goods in labouring time, but likewise that there were other goods upon the ground belonging to the said Lawson, pursuer, sufficient to pay the debt, and which were either in the poidner's view, or offered to be shewn him, or that he knew thereof. *Duplied*, Our law hitherto has required no more but to prove, there were other goods at the time on the ground sufficient to pay the poidner's debt, without saying they were shown or offered, or known to him; it being the messenger's duty to search for them; and it were an unaccountable hardship to oblige a debtor (to prevent his plough-goods from being ed) to expose and lay open all his other moveables to rigorous creditors, especially seeing such an offer of compliance might be construed as an homologation of the debt, and a passing from any objections he has against the same. *Triplied*, It were unreasonable to bind creditors-poidners to search all the ground, seeing they may be probably ignorant of the extent and limits of their debtor's land; and it is far more reasonable that the debtor (if he desires to redeem his labouring-beasts) shew and present his other goods; neither will this act, in obedience to law, import any acknowledgment of the debt, or legality of the poinding, or cut him off from any defences against the same. Some thought the debtor obliged to shew his other goods, if he would prevent the poinding of his plough-goods; but it being proposed, what if the messenger searched for other moveables and found none, if this would not be sufficient to liberate the creditor-poidner, even as the messenger's assertion in denouncing of lands to be appraised, that he searched for moveables and found none, is credited? Therefore the LORDS, before answer, ordained the execution of poinding to be produced, to see if it bore any search for other moveables; but, however, the LORDS seemed all clear, that *esto* there were other moveables, and no search for them; yet in this case it would not be found a spuilzie, but only infer simple restitution.

Thereafter Lawson, in a petition, having offered to prove, that, in the same place where they poinded the horses, there were seven milk-kine subjected to their view; and that the messenger and his accomplices, taking a drink at the time, sat down upon sacks of corn belonging to him, and yet poinded none of these, but only his plough-horses; the LORDS allowed him a term to prove this condescendence.

Fol. Dic. v. 2. p. 94. Fountainhall, v. 2. p. 187.

1707. March 11.

Lieutenant-Colonel JOHN ERSKINE of Carnock *against* LADY BETTY BOSWELL,
and L. AUGHINLECK her Husband.

A POINDING of the ground of Kincardine at the instance of Lady Betty Boswell and her husband, for some bygone arrears of an annuity assigned to Lady

No 42.
time, was no spuilzie, but that there must be restitution.

No 43.
A poinding warrantable, although the