

* * * Fountainhall reports this case :

WOOD pursues Stuart for a spuilzie of labouring horses. *Alleged, 1mo*, His labouring was only of some few burrow acres, which was not to be till January, and this poinding was in December; *2do*, There was then a great frost, and so no labouring; *3tio*, Six horses were too many, and so he might only poind some of them.

Fountainhall, MS.

No 27.

1678. July 19.

TILlicOUNTRY against L. ROLLO.

IN a case between Tillicoultry and L. Rollo, the LORDS found a bond wanting witnesses could not be adminiculate nor made up by extraneous witnesses. *2do*, Where the penalty in a bond was left blank, and the said blank scored, the LORDS refused to modify any expenses, but assoilzied altogether therefrom. *3tio*, A man may cause poind goods of his debtor's that are in his own custody, and that for debt owing to him by the debtor.

Fountainhall, v. 1. p. 10.

No 28.

1679. December 13.

HAY against HAY.

HAY of Kirkland pursues Patrick Hay for spuilzieing of his corns and two barn-yards, wherein lawful poinding being sustained, by way of defence, an execution of the poinding was produced, against which it was *objected*, That it was null, bearing "only poinding at the cross by a rip or parcel of corn, and pricing the bolls with the fodder;" but bearing nothing, "that the messenger choosed a skilful caster for proofing the corns upon oath, and that either party was allowed to see the proof casten and measured.

And therefore the LORDS found the execution null and admitted the quantities and prices to the party's oath *in litem*; but ordained the fiars likewise to be produced, that thereby they might tax the price if the oath were exorbitant, and likewise would tax the quantities by the testimonies of the witnesses adduced by the pursuer, if his oath as to the quantities seemed exorbitant.

Fcl. Dic. v. 2. p. 92. Stair, v. 2. p. 723.

No 29.

A poinding found null, because the execution bore not that the messenger had appointed a sworn tasker to cast the corns, and to thresh and measure the proof at the sight of both parties.

1682. November 21.

STRAITON against PRESTON.

IN an action of spuilzie pursued by Straiton against Preston for poinding of labouring goods in labouring time; the LORDS found these two defences *sepa-*

No 30.

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.