*** Fountainhall reports this case:

No. 58.

1682. *March* 1.—In the case of Mr. John Kincaid, advocate, against ———, "the Lords found the act of indemnity in July, 1679, did not discharge this spuilzie of horses now pursued for, seeing they were not taken *tanquam præda hostilis in flagrante bello*, but the next day, two miles from Bothwel-bridge, the place of the battle; and it was not proved that they belonged to any who were in that rebellion."

Fountainhall, *v.* 1. *p.* 177.

1683. *February.*

DAVID RAMSAY *against* DAVID and WILLIAM BARROWMANS.

No. 59.

In a spuilzie for violent profits, at the instance of the owners of horses seized by some persons at the first rise of the western rebellion,

Alleged for the defenders: That they were secured by the indemnity, and could not be liable in a spuilzie, which is penal; nor yet in simple restitution, seeing the horses were lost, and the defenders made no benefit by them.

Answered for the pursuer: This process being neither *vindicta publica*, nor *privata*, but only *pretiosa*, for damage and interest to a party lesed, it cannot fall under the indemnity. 2*do*, The horses being robbed, without special warrant of officers, and before they were formed into any companies, the deed must be considered as a private depredation.

The Lords did not sustain the spuilzie as to all the violent profits contained in the decreet; but allowed to the pursuer the prices, with the annual-rent from the time the horses were taken away, and large expenses; and found all the defenders liable *in solidum*.

Harcarse, (SPUILZIE) *No.* 858. *p.* 244.

1683. *November.* WILLIAM THIN *against* SCOT of Langshaw.

No. 60.

One being pursued for the spuilzie of a horse and a load of corn, alleged, That the horse (which belonged to the miller of a mill without the barony) was lawfully seized and detained as escheat, conform to the statute of King William, Cap. 9. for carrying the defender's tenant's corn to a mill out of his barony to another mill;

Answered: The statute is now in desuetude.

The Lords found the defender liable for restitution of the horse *in statu quo*; but refused to find him guilty of a spuilzie, in respect of the colourable pretext he had for seizing and detaining the horse from the said statute.

Fol. Dic. v. 2. *p.* 391. *Harcarse*, (SPUILZIE) *No.* 860. *p.* 244.

No. 60.

*** Sir P. Home reports this case:

William Thin having pursued Francis Scot of Langshaw for the spuilzie of a horse; alleged for the defender, Absolvitor, because the horse was lawfully poinded, in so far as it was seized upon when the pursuer was carrying corns that were thirled to the defender's mill to be grinded at another mill; and therefore, conform to the statute of William, Cap. 9. the heritor of a mill or his servants may lawfully seize upon the horse, which is confiscated to the master, and the sack and corn to the miller; as also, Langshaws had made an act of court, ordaining the horse, in that case, to be confiscated. Answered, That the foresaid statute is in desuetude, as Craig observes, Lib. 2. Dieg. 8. and that our custom doth regard that statute no farther than that the sacks and corn should be cast off the horse, and adjudged to the master, but that the horse itself should be restored to the owner; and by a decision, the 22d January, 1635, No. 5. p. 1815. *voce* BREVI MANU, the Lords, in that case, sustained that defence only to assoilzie from a spuilzie; and any act of the defender's court cannot be sustained, being contrary to the law. The Lords restricted the spuilzie to wrongous intromission, and found the defender liable for the price of the horse; but found that he might lawfully seize upon the corn and sacks that were carrying out of the thirle to be grinded at another mill.

Sir P. Home MS. v. 1. No. 498.

*** P. Falconer's report of this case is No. 12. p. 1820. *voce* BREVI MANU.

1687. *July.* LORD GLENURCHY *against* DUMBEATH.

No. 61.
Whether a messenger was guilty of spuilzie who poinded goods, to which a third party showed a disposition, which he refused to swear was not in trust?

Dumbeath having poinded my Lord Broadalbin's goods, my Lord Glenurchy, his son, compeared at the cross, and offered to make faith, that the goods were his; and for clearing thereof, produced a disposition and instrument of possession; but having refused, at the messenger's desire, to depone if the disposition was to his own behoof, or in trust to his father's behoof, the messenger proceeded to the poinding, and the goods were appretiated at a very low and inconsiderable price. My Lord Glenurchy raised a spuilzie upon this ground, That the messenger should have sisted upon the offer to make faith without farther expiscation; and by custom it is sufficient to send a disposition, though the owner be not present; his presence to make faith being required where he has no title in writ.

Answered: The sending of a disposition would have sufficed to stop the poinding, had not the pursuer been present, and by his refusal to depone on the trust gave rise to suspicion. 2*do*, If mock dispositions in trust, when the haver refuses to depone on the trust, would secure against poinding, then all poinding would be disappointed.