The Lords having considered a probation *hinc inde* before answer, and finding it suspect upon both sides, except as to four of Glenurchy's own horses, which were not contained in the disposition, they found the defender liable in a spuilzie *quoad* these four horses. And not being clear as to the rest of the goods, they appointed a new probation of the true value of the goods poinded, without respect to that in the executions, in order to restitution; and delayed to consider if the messenger was punishable for proceeding to poind after the party offered to make faith in manner foresaid. And the Lords were the more tender to find it a spuilzie as to the cows, because it appeared, from a probation led in a reduction of the disposition in favours of the pursuer upon the act 1621, that the property of these cows was not my Lord Glenurchy's, but Broadalbin's. No. 61.

Harcarse, (SPUILZIE) *p.* 245.

1702. *January* 22.

JAMES SINCLAIR, brother to Dumbeath, *against* DUNBAR of Hemprigs.

No. 62.
Poinding without a previous charge.

This was an action for a spuilzie of cows, &c. The defence was, Lawfully poinded by virtue of a decreet of the northern Justiciary against the said James Sinclair for 3000 merks of fine, for convocating the lieges, and invading Hemprigs' tenants, breaking up their houses, tying them with cords, and carrying them and their goods away prisoners. Answered, The poinding was unlawful, being within fifteen days of the charge, which space the 4th act of Parliament 1669 requires; and Stair, Lib. 4. Tit. 47. says, that even where there needs no charge, the days of law after the decreet ought to be free from poinding, that parties decerned may in that interval of time either satisfy or suspend. Replied, The act 1669 being a correctory and restrictive law, concerns only personal debts in civil cases, but nowise criminal execution, by way of fine or punishment; seeing a person, being found guilty, may be immediately attached and put in prison, till he pay, and his goods put in custody, which the Roman law calls *annotatio bonorum rei;* and if this be allowed, then much more present poinding; for if they get a charge on fifteen days, ere that elapse they shall drive all their goods to the isles or mountains, and so wholly frustrate and evacuate the poinding. The Lords thought the act 1669 did not regulate criminal procedures; and Sir George Mackenzie, in his notes there, shews cases where a previous charge is not necessary: But the Lords observed, that the decreet bore a warrant to charge; *ergo* that ought to have preceded; and the clause for immediate poinding was controverted as interlined; therefore they resolved to hear the cause in their own presence.

1702. *February* 19. The spuilzie mentioned 22d January, 1702, between Sinclair and Hemprigs, being debated and advised, the defence was, Lawfully poinded by virtue of a decreet of the Commissioners of Justiciary for the northern district. Answered, That decreet could be no warrant, being arbitrary and inform-

No. 62.

al, and the execution of poinding thereon was both summary and illegal, fining James Sinclair in £.2000 Scots only for taking back his own goods, and not only imprisoning him till he pay, but ordering immediate poinding; and though they gave a charge, yet, without abiding the outrunning thereof, they poinded 300 cattle off his ground, and all to frustrate the said James' application for redress; and the Lords have often found, that the authority and shadow of such unjust decreets is no warrant to excuse and liberate the executors of the same, as Dury observes, 24th July, 1633, Dickson against Hallidays, No. 75. p. 14762. and Stair, 3d January, 1667, Brand, No. 8. p. 1817, *voce* BREVI MANU, that the authority of a magistrate was not a sufficient warrant to meddle with a chapman's pack deposited beside him; and in two late cases, Fea of Whitehall against Elphinston of Lopnes, No. 18. p. 9367. *voce* OATH; and Wiseman against Gordon and Logie of Boddom, *voce* VIS ET METUS. Replied, That it is an uncontroverted maxim, That the warrant of a magistrate excuses the inferior officers and servants, and that *quævis causa et color excusat a spolio*, and was so found, 4th March, 1628, Scot against Banks, No. 220. p. 6015, *voce* HUSBAND AND WIFE. 2*do*, In criminal cases execution may follow immediately; and the act of Parliament 1669, ordering a previous charge, relates only to civil debts in opposition to penal ones: And by the Roman law, L. 2. D. De re judicata, judex nonnunquam arctat, nonnunquam tempus judicati prorogat, pro causæ et personarum qualitate: and Antonius Matthæus, De criminibus, Tit. 17. Cap. 6. is express "ubi reus est in pœnam pecuniariam condemnatus, executio sententiæ statim fit, nec ei indulgetur spatium; nam quod debitoribus ex humanitate datur, ut id reis criminum concedatur nulla ratio suadet:" and Clarus says the same, Quæst. 95, and that *induciæ* in such cases give only an invitation and opportunity to withdraw their goods and effects, and the ordering a charge here was but superflua cautela, et utile per inutile non vitiatur, and seeing I could poind immediately, I might pass from that charge. The Lords considered that some precepts might be so unwarrantable as not to excuse the executors thereof, such as to poind on the Sabbath-day; but where there is a probable ignorance, it were hard to find them spuilziers. All the difficulty was, if it were not sustained as a spuilzie to give the pursuers their *juramentum in litem* on their damage, they might be straitened in proving what was taken from them; yet the Lords found this decreet, though iniquitous, was warrant enough to assoilzie from a spuilzie, but declared it to be wrongous intromission, in order to restitution; and that they would hear the parties as to the manner of probation, whether such a case required an exact and full probation of every individual taken away, or if lesser evidences might suffice.

Fol. Dic. v. 2. *p.* 392. *Fountainhall, v.* 2. *p.* 140, 148.