No 5. the keys himself, and were not in the defender's hands; but the same trunks being taken out by the messenger, and apprised by him, the defender was altogether ignorant what the messenger found therein: And the LORDS found, that the said poinding freed the defender of the arrestment, without prejudice of the pursuer's action against the poinder thereupon *prout de jure*, which the LORDS reserved to him against the poinder, as accords.

Act. *Nicolson.* Alt. *Belshes.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 178. *Durie, p.* 795.

1679. *December* 4.

FORRESTER *against* The TACKSMAN of the EXCISE of EDINBURGH.

No 6.
Found as above.

WILLIAM FORRESTER gave in a bill, representing that he had poinded the goods of John Grier brewer in Edinburgh, viz. his household plenishing and malt in his barns, and had apprised the malt by a parcel produced at the cross, and that the Tacksman of the Town's excise had procured a warrant from the Magistrates of Edinburgh, to close the doors where the said poinded goods were, whereby he was hindered in the effect of his poinding. Upon this bill the Tacksman compeared, and *alleged*, That before the poinding they had not only arrested for the King's Excise, but that the keys were taken off the rooms by the Magistrates, and that Forrester had come in but upon pretence to see the malt, and carried out a handful thereof surreptitiously, and thereby made a pretence of poinding the whole; but as for the household stuff, they were carried to the cross, and the excise being a privileged debt, the poinding after diligence therefor could not be sustained.

THE LORDS found the arrestment did not hinder Forrester to poind thereafter, and therefore sustained the poinding of the malt, whereof a parcel at the cross was sufficient, but not of the household plenishing, seeing they were brought to the cross; and as to the privilege of the Excise, allowed a condescendence to be made by what statute or custom it was pretended, and the parties to be heard thereupon.

Fol. Dic. v. 1. *p.* 178. *Stair, v.* 2. *p.* 717.

1736. *February* 13.

Competition, JAMES CORRIE, Provost of Dumfries, with ROBERT MUIRHEAD.

No 7.
Even an inchoate poinding, which was stopt

JAMES MUIRHEAD, merchant in Dumfries, having failed in his circumstances, Provost Corrie, who was creditor to him, arrested in the hands of Alexander Gordon, who had the possession of some shop-goods belonging to James; and

No 7.
without any fault of the creditor, was found to give a preference in competition with an arrestment first completed by a decree of furthcoming.

thereupon raised a furthcoming before the Magistrates of that town. During the dependence, Robert Muirhead, who was likewise creditor to James, charged him with horning; and, when the days were expired, he sent a messenger to Gordon's house to poind the goods belonging to his debtor; but Gordon stopt him, upon this pretence, that the goods were already arrested in his hands by Provost Corrie. Whereupon a competition having ensued, it was *contended* for Robert Muirhead, That he should be preferred to the Provost in the same way as if his poinding had been completed; seeing it would be unjust, if, after he had gone on as far as he could, until he was stopt, another should be allowed to step in and complete his diligence though posterior to his own. To illustrate which, a case was referred to, where an adjudger was, by the delays and artifice of a debtor, stopt from completing his diligence until another had finished his first; notwithstanding whereof the adjudger was found not to be postponed, or the other creditor to have any preference to him; the reason of which applies directly to the point in hand, as it was by an unlawful act of Gordon's the poinding was stopped, and who, by his possession of the goods, was debtor or liable for them to the creditors, according to their diligence.

On the other hand, it was *argued* for Provost Corrie, That he behoved to be preferred upon his arrestment; because, 1*mo*, No poinding could have proceeded legally upon the diligence done by his competitor; as the horning at Muirhead's instance wanted what was very material, namely, the word *apprise*, which is necessary when any thing is to be poinded; as it must first be valued, a step that is previous to and different from the poinding itself; for which reason it is constantly inserted in all hornings. Neither do the words to *poind* and *distrain* imply a power to do every thing necessary in order to the poinding; seeing very often making open doors is necessary, and it requires a particular warrant for that purpose. 2*do*, The execution on the back of the horning is vitiated; and so null. It is true, a fair one has been put into the process since the competition commenced, but that cannot remove the objection; as the protest, upon which Muirhead rests his preference, especially relates to the execution on the back of the horning, after which he was not at liberty to give in a new one.

In the *next* place, Supposing these objections were removed, an offer to poind does not transfer the property; if a messenger is deforced, there lies an action against the deforcer; but, as crimes can only touch those who are guilty of them, a third party doing diligence cannot thereby be prejudged. And as to the case of the adjudger, no decision is referred to, from which the circumstances can be known; possibly it might have arisen from personal objections against the creditor's completing his diligence in collusion with the common debtor. But, whatever was in that, if an offer to poind could be considered as completed in any case, it would only hold where all is done that could be to make it effectual. Now, here the messenger omitted to provide himself with letters of open doors, whereby he might have opened the presses in which the

No 7.

goods were standing; and no hinderance or stop was put to the poinding other than this, that Gordon refused to open these presses.

Answered for Muirhead; The objections to the formality of his diligence can have no influence; for, 1*mo*, With regard to the vitiation, that is removed, by producing an original execution, wrote out fair the same day with the other, which the messenger abides by. 2*do*, There is nothing in the observation, that the horning wants the word *apprise*; as it bears to *poind* and *distrain*; nay, the word to *poind*, was sufficient warrant for doing every thing that made part of the poinding; and, where that is, the word *apprise* is superfluous; therefore, as his diligence is unexceptionable, his attempt to poind must be held as completed. Nor is it of any importance, that an endeavour to poind does not transmit the property; as that is suppliable by a decree of the Court, giving a preference in respect of the diligence inchoate and unlawfully interrupted. Neither had the messenger any occasion for letters of open doors, as he got voluntarily within the house, nay, within the very room where the goods were lodged; and, although the law knows what letters of open doors are, yet letters to open chests and presses is a novelty. Besides, he is not bound to tell whether he had such letters or not; as the messenger was stopt, not for want of them, but on account of Provost Corrie's prior arrestment.

THE LORDS preferred Robert Muirhead.

Fol. Dic. v. 1. *p.* 178. *C. Home, No* 14. *p.* 35.

1767. *July* 27. HELEN STEVENSON *against* COLQUHOUN GRANT.

No 8.
An arrester having obtained from a Judge a warrant to sell; found the goods could not, in that state, be poinded, being held to be *in manibus curiæ*.

IN a furthcoming upon an arrestment, the arrestee having deponed upon certain goods in his hands belonging to the common debtor, the Lord Ordinary granted warrant to the inferior judge to sell the goods for behoof of the arrester; but, before the order was put in execution, the goods were poinded and carried off by another creditor. This fact produced an action for the value of the goods, at the instance of the arrester against the poinder. The Lord Ordinary having sustained the defence of lawfully poinding, the interlocutor was altered by the Court, who sustained the action, and repelled the defence, upon the following ground;—supposing goods to be *in manibus curiæ*, the Court cannot be deprived of its possession at short hand by a poinding. The goods were here under the power and direction of the Court, without which the Court could not issue a warrant for sale.

This argument appears to me inconclusive. In the *first* place, I see not clearly why even a proper sequestration in the hands of the Court of Session should exclude a poinding which proceeds upon the King's authority. *Secondly*, If a warrant to sell in a process of furthcoming be equivalent to a sequestration, so must a warrant for arrestment; for both warrants proceed equally upon the supposition that the goods are under the power and direction of the Court.