divided the ground of the conterminous heritor that there remained not sufficient space for an inclosure.

JUSTICE-CLERK. The statute still subsists. The inclosing there mentioned does not seem confined to ditch and hedge: the species of inclosure must be determined by circumstances. Every estate is profited by inclosing.

HAILES. It is said that this statute may be turned into an engine of oppression by great against petty landholders: we are not to judge of possible grievances. It is remarkable that this statute has been in full force for upwards of a century, and yet there has been no one instance where it has been used as an engine of oppression; so that here there is nothing more than the apprehension of a grievance.

MONBODDO. I cannot agree to the doctrine that pasture farms are not within the law. There is scarcely any sort of soil which may not be improved by culture, at least by trees.

PITFOUR. Wherever ground enough is left out for making an inclosure, the law takes place. Such was the principle in the case of *Penman*, where the law was found not to apply, because there was no subject fit for making an inclosure.

PRESIDENT. The law has been found not to relate to small feuars, to ministers, nor where the quantity of ground was insignificant or cut by a road. Did the case occur of some great landholder endeavouring to ruin his little neighbour by calling him to bear march dyke for many miles, I should possibly not give way to such a demand, upon the statute.

COALSTON. The law relates to every species of ground except flow mosses, for which no manner of improvement has as yet been discovered; yet I cannot blame the tutors for trying the question.

On the 5th December 1769, "The Lords found that the Marquis of Tweeddale is bound to concur with Mr Riddel in making the inclosures, except where the high road lies upon or near to the march;" adhering to Lord Elliock's interlocutor.

*Act.* R. Campbell. *Alt.* A. Murray, A. Lockhart.

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1769. *December* 7. MESSRS FOGGO and GALLOWAY *against* JOHN SCOTT and WILLIAM OLIVER.

## LEGAL DILIGENCE.

**Poinding cannot proceed in name of the Assignee, upon a Horning raised by the Cedent.**

[*Fac. Col. IV.* 362; *Dict.* 3693.]

PITFOUR. The case of *Stewart* and *Hay* was deliberately considered: I remember it well; and the judgment of the whole writers to the signet was given

unanimously. It is a right judgment. An attempt has been made to distinguish between the case of a horning and of a poinding; but the distinction is not solid. When we attend to the construction of letters from this Court, we must consider them as mandates. If they are mandates, they must be strictly interpreted. Here there is a question not only of *mandatum*, but of *mandata jurisdictio*. No more authority is given than to extricate the jurisdiction. A horning is a single act, wherein a messenger has no means of judging: in an apprising there is a *tractus futuri temporis;* and many things may occur, concerning which the messenger must form a judgment. But, in poindings, or the like, there is no occasion to give him a power to execute against B, when he is ordered to execute against A; nor to execute in the name of B, when he is ordered to execute against A. Where things occur, in which the letters cannot instruct the messenger, he must judge and execute at his peril. The case of *Clapperton* is not to the purpose; for the assignation, on which the diligence proceeded, was amissing, so that the only thing which supported the apprising was long possession: it could not be supported by the assignation, supposing it regular; for no such assignation was produced.

MONBODDO. I always understood that messengers and sheriffs in that part are not different persons. Anciently, sheriffs executed all writs; afterwards, this was confided to messengers: they became sheriffs for a particular purpose. Where execution only is required, the messenger has the executive power alone: in apprisings and poindings, where more than simple execution is required, he has a judicative power. In apprisings, he who obtains assignation, even after assignation may have the possession adjudged to him; and the same ought to be the case as to poindings.

COALSTON. A messenger cannot execute against an heir upon a diligence used against the predecessor: if so, how can he execute for the heir upon the diligence used by the predecessor? If we once depart from this principle, that our letters are a mandate, and to be strictly interpreted, I do not see where we are to stop.

GARDENSTON. I imagined that the usage, mentioned by the Writers to the Signet in 1745, related to arrestments alone, and not to poindings; but now I see the case to have been otherwise, and therefore would alter my interlocutor.

AUCHINLECK. I can see no reason for explaining the powers of a messenger so strictly. This would be a great bar in obtaining justice. The *majus bonum* of the public got the better of *summum jus*, in the case of apprising; why not so also in the case of poinding?

PRESIDENT. The question is, not as to the rights of parties, but as to the method of executing the diligence of this Court. There might be some difficulty in the case of assignees: here the case is as to executors. I have so much regard to practice in matters of that sort, that I cannot consent to alter it. The fixing this point does no harm, whether it be fixed right or wrong; but I do not wish to see vacillancy in our determinations, in matters of form. There is no utility in deviating from the rule by subtle reasoning. I call it subtle reasoning; because the writers, who give their opinion according to the interlocutor, do it not from their own knowledge of the practice, but from an argument in law, drawn from the analogy of the case of *Clapperton*.

On the 7th December, 1769, "The Lords sustained the objection to the poinding;" altering Lord Gardenston's interlocutor.

*Act.* D. Armstrong. *Alt.* R. M'Queen.

*Diss.* Auchinleck, Monboddo. No vote put.

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1769. *December* 7. ROBERT WILLOCK and OTHERS *against* JOHN AUCHTERLONY.

## HERITABLE AND MOVEABLE—FACULTY.

**Arrears of interest upon a debt secured by adjudication, heritable, not transmissible by testament. A disposition in trust, the purposes of which were only thereafter declared in a testament, but for which there was a reservation in the trust, held to be a sufficient conveyance of heritable subjects.**

[*Faculty Collection, V.* 18 ; *Dictionary,* 5539.]

MONBODDO. The subjects in question were properly vested in George Auchterlony. The question is, Whether he could dispose of them by latter will and testament? And here is a question, Whether the annualrents of an heritable bond, upon which adjudication followed, would pass by will? My opinion is, that they could not. An adjudication has been a sale under reversion ever since 1469. By the statute then enacted, the sheriff was authorised to sell the land for the proprietor's debt: if a purchaser appeared, they were adjudged to the purchaser, under a reversion, during seven years, for the behoof of the debtor. If no purchaser appeared, they were adjudged simply to the creditor, without any reversion. This was held to be law down to 1738; and was laid down as law in the decision *Ramsay* against *The Creditors of Clapperton.* This decision was not a subtlety, as it has been called: it was only distinguishing between things which are different, a *pignus* and a sale. As to the disposition in favour of the trustees, here was an indirect method of devising heritable subjects by latter will and testament. The deed of trust was never delivered; but, although it had been delivered, it would not *de presenti* have given any right to the trustees, unless George Auchterlony had made a will. It seems to follow that Auchterlony gave away no part of his heritable estate by a disposition or deed *inter vivos.*

PITFOUR. It is too late to dispute the decision of Clapperton, unless it could be alleged that Auchterlony did not know of the adjudication having been deduced, and that the adjudication itself was null. The decision of Clapperton has been sanctioned by practice. Every ranking of creditors, for these 30 years past, has proceeded upon that decision being law: To vary it would create confusion and distrust. I am sorry to see any of the cardinal decisions of our law called in question. As to the second question; the decisions of *Forbes* and *Pringle of Crighton,* in the House of Lords, have so far explained or mitigated