

1663. *January 8.* MURRAY of Merstoun *against* HUNTER.

MURRAY of Merston pursues Thomas Hunter for a spuilzie of malt, who *alleged*, That as to that member of the libel of the spuilzie of the malt, by the defender's hunding out, or command, it is only relevant *scripto vel juramento*. The pursuer *answered*, That she qualified the probation thus, that the defender intrusted a messenger, or officer, to execute a precept of poinding, by delivering him the precept, and therefore the precept, with the execution thereupon, is sufficient probation. The defender *answered*, That the same is not sufficient; because the officer executed the precept *extra territorium*, whereby it became a spuilzie, which ought not to be imputed to the defender, unless it were offered to be proved, that he ordained the officer to poind this malt without the jurisdiction, and that only *scripto vel juramento*. The pursuer *answered*, That as the giving of a precept of sasine is a sufficient warrant, without any other procuratory, whatever the effect of the sasine be, so must the delivery of the precept of poinding be sufficient to instruct the warrant, or command to poind, wherever the poinding was executed, and the user of the poinding should be liable to the deeds done by the person he intrusts; especially, seeing not only the messenger was sent, but other servants, and messengers, employed by the user of the poinding.

THE LORDS found the giving of the precept of poinding to the messenger, and his unwarrantable poinding *extra territorium* not sufficient only, but found it relevant to prove by the messenger, and defender's servants employed by him, their oaths, that they were commanded to poind this malt, or other goods, in this place, being *extra territorium*. See PROOF.

*Fol. Dic. v. 2. p. 159. Stair, v. 1. p. 153.*

No 281.

A precept of poinding being unwarrantably executed *extra territorium*, found not sufficient to infer spuilzie against the employer, unless it were proved, that the messenger had express orders from him.

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SECT. VI.

Soldier acting as of a Party in Arms.

1664 *June 25.* FARQUHARSON *against* GARDINER.

MR JAMES FARQUHARSON having obtained a decret of spuilzie against John Gardiner and others, Gardiner suspends on this reason, that he meddled with the goods in question, as a soldier in a party in arms, being then in the regiment of the Master of Forbes, under the command of the Earl of Middleton,

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No 282.

To give the benefit of indemnity to a soldier, mandate was presumed, if he