No. 57. caused determine the skaith, and by that sentence poinded the horse, or other goods belonging to the charger; the custom of putting of goods in poind-folds being only to make the fact evident, and to leave the poinded goods in that condition, till another wad were offered for the skaith, but could never warrant the appropriating the goods poinded, without lawful poinding by a sentence. 2*do*, The horse was taken off the ground designed for the charger's horse and kine by the act of Parliament, at which designation the suspender was present, and which gave the charger warrant to enter in possession, and for which he would have obtained letters of horning to possess it of course; and though there might have been objections against the legality of the designation, whereupon the suspender might have used civil interruption, it could not warrant the appropriating the charger's horse; and, in this process the value of the horse was proved to be £.10 Sterling, and the ordinary profits and expenses were modified to £.40 Scots, without exorbitant prices or profits, or oath *in litem*. It was replied, That the Lady Aiton was not called to the designation, and that he did not alter her possession, which behoved either to be obtained by consent, or legal executorial, *et quodlibet excusat a spolio*; and the custom of the country is, when any beast is poinded for skaith, if the transgressor do not give satisfaction, it may be retained; and now the suspender is willing to restore the horse, in as good case as he was.

The Lords sustained the decreet, and found that the suspender could not appropriate the horse, unless he had obtained a sentence, and thereby lawfully poinded him.

Stair, *v.* 2. *p.* 712.

*** Fountainhall reports this case:

The Lords found the horse spuilzied, because it was not offered back within 24 hours after it was poinded for the skaith, that he ought not to have kept the horse longer than he might have recourse to the Judge Ordinary.

Fountainhall MS.

1682. *February.* KINCAID *against* MUIRHEAD.

No. 58.

One who went with the King's army to Bothwel, having, about two hours after the defeat, plundered some horses out of a house, about two miles from the place, and being pursued for a spuilzie, he alleged, That what he did was by occasion of war, and fell under the act of indemnity.

The Lords repelled the defence, unless it were proved that the pursuer had been then a rebel.

Harcarse, (SPUILZIE) *No.* 856. *p.* 244.

*** 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.