On advising bill and answers, the LORDS unanimously "adhered;" and refused to allow a proof before answer upon the usage and custom of messengers, which the defenders prayed for. No 51.

Kilkerran, (POINDING,) *No* 3. *p.* 405.

1756. *January* 27.

ROBERT MURRAY, Tenant in Vogrie, and MORTON his Trustee, *against* MANSFIELD and Co. Merchants in Edinburgh.

No 52.
A messenger being prevented from poinding by another messenger, the creditor thus excluded was brought in *pari passu* with the other poinder, *pro rata* of the debts.

MANSFIELD being creditor to Jackson at Dalkeith, took out diligence, and commenced a poinding of the debtor's shop-goods. As the quantity of these goods made this a work of several days, another creditor, Morton, during the course of the poinding, appeared with his diligence, and offered to poind in the same shop; and being barred by Mansfield, upon pretext that he could not come in upon a poinding already inchoated, Morton's messenger retired, after taking a protest in the following terms: 'That he meant only to poind 'such part of the debtor's goods as Mansfield had not poinded, and only to 'conjoin with him in poinding the common's debtor's effects; and therefore 'protesting, that as he was stopped from doing this, Mansfield should be liable 'for the debt due to Morton.' After this interruption, Mansfield proceeded to complete his poinding.

THE LORDS were generally of opinion, that this was a deforcement sufficient to infer damages; but it appeared doubtful to what extent. The debt due to Mansfield was large. The debt due to Morton not the fifth part of it. The quantity and value of the goods poinded were distinctly ascertained by Mansfield's execution of poinding; and the doubt was, whether Morton should draw from him the one-half, or only a rateable proportion, respecting the extent of their respective debts. Memorials were appointed to be given in upon this point; and at advising, the reasoning of the Judges was as follows: When debts are conjoined in a poinding, and the same messenger poinds for the several creditors, the property of the subjects poinded belonging in common to the creditors, must be divided amongst them *pro rata*, whether the *ipsa corpora* or the price after a sale. The case is precisely the same as where a man dispones his estate, or certain funds to his creditors for their payment. If there is not sufficiency for paying the whole, the price of the subjects when sold must be divided amongst them *pro rata*. It is upon the same foundation that adjudgers or arresters ranked *pari passu* draw *pro rata*. But two creditors poinding at the same time, in the same shop or warehouse, are in a different state. Each creditor by his own messenger poinding different subjects, they are in the same case as if they were poinding in different corners of the country. There is no common property established, and consequently no place for a rateable distri-

No 52. bution of the price. It is true, indeed, that if two messengers, acting for different creditors, lay their hands at the same instant upon the same subject, and complete their poinding at the same instant, the property, which cannot be transferred to both separately, must be transferred to both in common; which of course gives each an interest *pro rata*, Had the messenger employed by Morton attempted to poind in a different part of the shop, the damages he was entitled to claim from Mansfield for stopping his poinding, must extend to the half of what Mansfield himself poinded; for it must be presumed, that Morton's messenger, had he not been interrupted, would have gone on as quickly as Mansfield's messenger. But Morton's messenger did not attempt to proceed in his poinding separately. It appears from his protest, that his demand was only to be conjoined in the poinding; and, therefore, his damages must be confined to what he would have drawn had he been conjoined. This, as aforesaid, can amount to no more but to a part of the goods poinded, in proportion to his debt.

It was further observed, that Mansfield, liable for this proportion to Morton, is entitled to a deduction, namely, a proportion of the expense of poinding; for this proportion is saved to Morton; and the case must be held as if Mansfield had poinded for both.

It was accordingly found, 'That Mansfield was liable for a rateable proportion only, deducting the expense of poinding.'

This decision, founded on principles, deserves to be recorded; though there is now no longer place for the question, after the late act of sederunt giving a new form to poindings.

Sel. Dec. No 100. *p.* 140.

*** The same case is reported in the Faculty Collection:

While Wood a messenger, employed by Mansfield, was poinding the goods of Jackson; Meek, a messenger employed by Murray, attempted to join him in the poinding; and when forced by the first to desist from his attempt, took a protest that he should be conjoined in the poinding.

The Lords having found Murray entitled to a share of the goods which he had thus been prevented from poinding, a doubt occurred, by what proportion this share should be ascertained; whether the produce of the poinding should be divided equally betwixt both parties, or should be divided in proportion to their debts.

Pleaded for Murray, the creditor in the lesser sum; He who is debarred from poinding ought to have that value which he would have poinded, had he not been debarred; and it is to be supposed that one messenger would have poinded as quick and as much as the other.

Pleaded for Mansfield, the creditor in the greater sum; In analogous cases, the division is *pro rata*; as in arrestments used on the same day, and in adjudications led within year and day. No 52.

It is contrary to equity, that a creditor for a small sum should receive full payment of his debt, when another, for a great sum, and equally forward in diligence, does not draw above one-tenth part of his.

Besides, when a messenger poinds for two creditors, the produce of the pointing is divided according to the debts. Now, here Meek desired only to be conjoined in the poinding; and, consequently, only desired that the produce of the poinding should be divided according to the debts.

The Lords found, that the division must be *pro rata*, according to the amount of the respective debts, in the same manner as if the parties had been conjoined in the poinding.

Act. *M'Queen.* Alt. *Lockhart.* Clerk, *Gibson.*

Fac. Col. No 179. p. 266.

1769. *January* 25.

Robert Steven, &c. Trustees for the Creditors of Alexander Arbuthnot, *against* John Craich and James Mitchel.

No 53.
A messenger who, without letters of open doors, had removed trees which served as a barricade to the door of a wood yard, and so made entry and poinded, was assoilzied from reduction of the poinding.

Alexander Arbuthnot, merchant in Montrose, possessed a timber-yard in the links of Montrose, inclosed on one side by close sheds for workmen, and on the other three by a pailing of wood from six to eight feet high, with an opening of about two inches between the rails or stakes. On the north-west side there were a gate and a small door, the usual entries to this wood-yard, secured by locks; on the south-west side there was another large gate for the purpose of receiving timber and carriages from the sea-side, made of paling like the rest of the inclosure, without lock or bands, but secured on the inside by three trees, of 12 to 14 feet long, the greater ends of which were fixed or rested against the ground, and the smaller ends against the back or upper cross-bar of the gate.

Charles Thomson, a messenger employed by Craich and some others, finding the gate and door on the north-west side locked and secured, without application for letters of open doors, poinded and carried off the wood in the yard, by removing, on the outside, the trees that supported the south-west gate.

In their action for reduction of the execution of the poinding, it was *pleaded* for the pursuers, That, in every step of diligence, there is a special warrant, pointing out what the party may do upon it, and that he must be restricted by the authority of his warrant. The diligence of the defenders entitled them to poind the effects of their debtor, provided they could come at them in a regular manner, but did not authorise them, without letters of open doors, to break into his house or inclosures, to lay hold of those effects. In no case whatever can a door, locked or secured in such a way as to exclude indifferent persons from access without violence, be opened by a messenger, in virtue of a horning or simple warrant to poind. Letters of open doors, which mention a