

poindings and comprisings so executed, as the defender alleged, and that the said alleged use and custom could not be proved otherwise, by any witnesses, both tending to destroy and change the infeftments, and against the tenor thereof; and also in effect to make up an act in itself unlawful, to make it lawful by the testimony of witnesses, which was alike as to prove poinding by witnesses; the LORDS found, that this custom, to execute poindings and comprisings at the place excepted on, was probable by witnesses, viz. by messengers, executors of such acts, and by the witnesses present with them the time of their executions; and that there was no necessity to prove the same by production of poindings and comprisings executed, because parties, deducers of poindings, when they are satisfied, will deliver to their debtors these executions back again, or they will then cancel the same, and so such writs may probably not be recovered by the party, to prove his duply, and this was to eschew spuilzie.

Act. Stuart.

Alt. Nicolson.

Clerk, Scot.

Fol. Dic. v. 2. p. 232. Durie, p. 510. & 515.

No 250.

1662. January 7. EARL LAUDERDALE *against* TENANTS of SWINTON.

As a defence against a singular successor in a barony, it being *alleged* by a tenant, pursued for his rent, That it was the custom of the barony for tenants to pay a half-year's rent at their entry, and so to be free of rent at the term they remove; the LORDS allowed the custom of the barony to be proved by witnesses.

Fol. Dic. v. 2. p. 232. Stair.

No 251.

* * * This case is No 5. p. 10023. *voce* PAYMENT BEFORE HAND.

1667. November 23.

LORD JUSTICE CLERK *against* The LAIRD of LAMBERTOUN.

THE Lord Rentoun, Justice Clerk, having pursued Lambertoun for the spoiling of his woods and planting in the beginning of the troubles; the parties did agree, that what detriment of the wood should be proved by witnesses, to be adduced *hinc inde*, the one half thereof should be paid by Lambertoun.

THE LORDS granted commission to five of their number, who examined witnesses upon the place. Three of the pursuer's witnesses proved the half of the damage to be 11,000 merks, and gave clear reasons of their knowledge. Two of them were used by the defender also, and two or three of the defender's other witnesses deponed that the whole damage was about 2000 merks, and a third *ex auditu* agreed in some points. At the advising of the cause, the question arose whether the Lords might modify betwixt the two extremes; or if they

No 252.
What the rule
in weighing
dubious evi-
dence.