

facto given or not; no witnesses would have been receivable, but the instrumentary witnesses only.

No 362.

Fol. Dic. v. 2. p. 242. Spottiswood.

* * * This case is No 362. p. 12496.

1642. *January 24.* SMITH *against* WILLIAMSON.

No 363.

IN a subsidiary action against a Magistrate for suffering a prisoner to escape, the messenger's execution was found not, *per se*, probative, that the rebel was warded by command of the defender, but the instrumentary witnesses, or other habile witnesses, were allowed to be adduced.

Fol. Dic. v. 2. p. 242. Durie.

* * * This case is No 33. p. 11705. *voce* PRISONER.

1666. *December 19.* WILLIAM LUNDIE *against* WILLIAM AUCHINLECK.

No 364.

WILLIAM LUNDIE intends action of spuilzie against William Auchinleck, for spuilzing and away-taking his plough, upon the 10th March last, in the time of labouring, whereby he was prejudged exceedingly, his lands lying partly-untilled, and what was not tilled was not sown. It was *alleged* by the defender, *Absolvitor*, because he offered him to prove, that the pursuer had sold the goods libelled, long before the alleged spuilzies; *2do*, The goods were lawfully pointed; to which it was *replied*, The allegiance ought to be repelled, unless it were alleged that the goods had not only been sold, but likewise delivered, seeing *traditione sola transfertur dominium*, and *emptione* the defender could have only *jus ad rem*, which would only be an action of delivery of the goods, but had no real right in the goods, and therefore could not break the public peace, to seize upon the said goods, *brevi manu*, without a sentence of a judge; *2do*, The foresaid allegiance ought to be repelled, because the goods libelled were plough-goods, actually ploughing upon the 10th March, which was the time at which the same could not have been pointed, unless there had been no other moveables upon the ground of the lands belonging to the pursuer; but so it is, the pursuer offers him to prove, that there were corns in the barn-yard, and corns in the barn, and horse, nolt and sheep, far exceeding the value of the sums alleged pointed for, besides utensils, and therefore the defender must be liable for a spuilzie, having maliciously, contrary to the laws of the kingdom, pointed the pursuer's plough-goods, whereas, within the pointer's view, there were far more moveables than would have satisfied the debt. To which it was *duplicated*, by the defender, That he offered him to prove, that the of

Process of spuilzie of labouring goods was sustained, the pursuer positively proving that there were other pointable goods in view, and the messenger's execution to the contrary was disregarded.

No 364.

ficer not only made search, but likewise enquired at the pursuer, if he had any moveables else upon the ground. To which it was *triplied*, That the officer's execution, albeit it were produced, could make no faith, he being a party principally called in this process, against whom the pursuer does insist; *2do*, The pursuer offers him to prove, that he was *alibi* distant ten miles the time of the pointing, and so the messenger could not have enquired at him; *3tio*, The pursuer offers him to prove positively that there were corn-stacks in the barn-yard, and horse, nolt, &c. within the defender's view, which would have satisfied the debt. THE LORDS repelled the first allegiance, founded on the condition, in regard of the reply made thereto; and also repelled the allegiance of pointing, in respect of the reply and triply pronounced for the pursuer, whereby it is offered to be proved, that there were more goods pointable upon the ground of the lands, and in the pointer's view the time of the alleged pointing, than would have satisfied the debt.

Fol. Dic. v. 2. p. 242. Newbyth, MS. p. 88.

1685. *March 24.* GLENDINNING *against* GLENDINNING.

No 365.

FOUND a note of a messenger pointing some oxen, not sufficient to instruct that the creditor pointed them, because it was not by way of instrument, nor were the letters of pointing produced.

Fol. Dic. v. 2. p. 242. Fountainhall.

. This case is No 67. p. 9213, *voce* MUTUAL CONTRACT.

SECT. II.

Notary's Instrument.

1541. *March 24.* MILLER *against* The LAIRD of CULLERNIE.

No 366.

ANE instrument under the note and subscription of ane notary-publick, beir- and ony gudis or geir alledgit spuilzeit to have bene lauchfullie restorit, als gude as thay wer the time of the away-taking thair of fra him, preivis not the avail of the saidis gudis, nor zit that thay wer als gude the time of the restitutioun, as