

No 250.

Found, that the custom of executing poindings at a particular place, was proveable by witnesses.

1630. *March 18.* CHISHOLM *against* L. TORSONCE.

IN a reduction of a poinding deduced by Pringle of Torsonce, of the said Chisholm's goods, because the same were not lawfully appraised, neither at the head burgh of the sheriffdom, nor yet at the head burgh of the regality, within the which the lands lay where the goods were apprehended, viz. neither at Edinburgh, nor Kirkliston, which is the head burgh of the regality of St Andrews, within which the lands of the bailiary of Stow lies, in which bailiary these goods were poinded; and the defender *answering* for sustaining of his poinding, That he offered to prove, that the frequent custom in the country was, that goods within the bailiary of Stow, were still poinded and appraised at the place called \_\_\_\_\_, which is the place where the goods libelled were poinded, and no use has been to drive goods to Kirkliston there to be appraised; this exception, upon the custom, was sustained to elide the reason; for the Lords would not reduce the poinding for not driving the goods, such as kine, and ewes, with lambs, to Kirkliston, being 20 or 24 miles distant from the place where the goods were apprehended, and where they were appraised; for by that deed the goods so driven might be undervalued, and the debtor's self thereby prejudged; neither was it respected that the pursuer *replied*, That poinding executed by virtue of the Bailie of Stow's precept, might be executed at the place of this poinding, and that that was the use and custom only kept in such poindings, but in poindings by virtue of the Lord's letters, as this was, the use was ever to execute them at Kirkliston; which reply was not sustained here, the action tending to reduce a poinding, deduced for a lawful debt, whereby to make the creditor a spuilzier, whereas neither the reason bore, nor was there any thing alleged against the debt, for the unlawfulness thereof, nor yet to purge the same, nor that the goods poinded were undervalued and poinded within the worth, or for less prices.

Act. —.

Alt. *Sandilands.*Clerk, *Scot.*

1630. *June 3.*—IN a spuilzie pursued against Torsonce by Chisholm, an exception of poinding being proponed, and the poinding produced, being quarrelled, because it was not executed at the place of the regality of Stow, which by the infeftment of that regality is designed and appointed; likeas the party poinded, dwelling, and the goods being within that regality; and the defender *duplicating*, That it has been the continual custom in all times by-past, to execute poinding and comprising, deduced against parties and their goods within that regality at the place of \_\_\_\_\_, at which place, this poinding executed on was executed, and nowise at that other place designed in the infeftment; which duply and exception being admitted to probation, and at the term assigned to prove, it being questioned betwixt the parties, and by the pursuer, who *alleged*, That this duply was only probable *scripto*, viz. by production of

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. &amp; 515.

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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

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What the rule  
in weighing  
dubious evi-  
dence.