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.

No 250.

Act. *Stuart.* Alt. *Nicolson.* Clerk, *Scot.*

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

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

No 251.

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.

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

1667. *November* 23.
LORD JUSTICE CLERK *against* The LAIRD of LAMBERTOUN.

No 252.
What the rule in weighing dubious evidence.

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.

ought to judge according to any of the highest testimonies, or according to the most pregnant testimonies, giving the clearest ground of their knowledge.

The Lords found the most pregnant testimonies to be the rule, and decerned, according to the least that the pursuer's witnesses did prove, as being that wherein all did agree, and not according to the most quantities that some proved.

Stair, v. 1. p. 488.

*** Dirleton reports this case:

In the case, The Justice Clerk against Lambertoun, the probation anent the value and worth of the woods pertaining to the Justice Clerk, and cut and intromitted with by Lambertoun, being advised; it was considered and represented by some of the Lords, that had been commissioned to examine the witnesses adduced by both parties, being allowed to have a joint probation, that the probation was dubious; the witnesses for the pursuer declaring too highly, and the witnesses for the defender too low, as appeared; and that the subject of the question not being *de re*, which is the proper object of sense, but *de rei valore qui cadit sub judicium et intellectum;* the testimonies of the witnesses are not *de rei veritate*, but *de credulitate et opinione*; and therefore are not *numeranda sed ponderanda*, according to the circumstances both of their own quality and the quality of the declaration, whether they have declared *verisimilia*, and whether *animose*, and such like; and whether they have given a probable reason of their knowledge; that in this case the witnesses that have deponed most to the advantage of the pursuer, are his own tenants, and one of them a smith and his officer; that they give the reason of their knowledge, that they dwelt in the bounds, which is not sufficient, unless they had been *periti*, and conversant about the matter of woods, and the buying and the selling, and the valuing of the same; that some witnesses for the defender had given their judgment upon oath as strongly and pregnantly as they, though they be not so many, so that the probation at best is but dubious, and *in dubiis minimum sequendum*; at the least the Lords have a latitude to found their judgment upon the testimonies of both *cum temperamento*, and without adhering precisely to either.

The Lords found, nevertheless, by plurality, That they should have respect to what had been proved by the most part, and accordingly decerned.

Dirleton, No 109. *p.* 46.