

articles, and given his bill payable to the trustees for the price; though the creditor *contended*, That he had openly expressed his disapprobation of the trust, and that seeing the bankrupt himself at the roup, he conceived it was held solely under his authority. See APPENDIX.

No 214.

*Fol. Dic. v. 4. p. 160.*

1791. May. 21.

HARIOT *against* CUNINGHAM.

HARIOT sued Agnes Cuningham for delivery of a gown, petticoat, and table-cloth, his property, of which he alleged she had got possession without cause and without his consent. The defender admitted, that the articles were in her hands, but urged, that they had been pledged by the pursuer's wife for the balance of a shop-account due by her and her husband; of which allegation, however, she had no other proof than an irregular account-book where the articles were entered, as also the balance due. THE LORDS were of opinion, That the defender being in possession of the articles, was in law presumed to be the owner: That the pursuer had no proof to the contrary, but the defender's own admission, which it therefore behoved her to take with the quality annexed; otherwise he must prove his property, and the *modus quo desiit possidere*, as he best could: They therefore found, That the defender was not obliged to give up the articles unless on payment of the alleged debt. See APPENDIX.

No 215.

*Fol. Dic. v. 4. p. 160.*

## SECT. XII.

## Verbal Contracts.

1781. December 12.

FRASER *against* LESLIE.

THERE was one Fraser that pursued one Leslie for succeeding in the vice of the Laird of            and Mr William Leslie his brother; a decree of removing being before obtained against the said Laird and his brother. It was *answered* and *excepted* by Leslie, That he ought not to be decerned to have entered as vicious possessor, because he entered before the warning, by virtue of a title given to him by one Gordon, liferenter of the lands, and by virtue of the same was in possession, and so he not being called to the said decree of warning, he could not be decerned as vicious possessor. To this was *replied*, and they offered them to prove, That the said Laird of            and Mr William his brother remained continually in possession until the time of the said warning, and so the defender could not be heard to make that allegiance. The contrary was

No 216.

A promise not to remove may be proved by witnesses, to the effect of preserving in possession for one year, but to no further effect.

No 216. alleged by the other party, That he was in possession before the warning; so the question was anent the priority of probation. There was *alleged* for the pursuer a practick of before, 22d November 1580, between Allan Coutts younger and Patrick G——, (See APPENDIX), where the exception was proponed and repelled. It was *alleged*, That the practicks were not alike, for Allan Coutts libelled possession before warning, and so took away the exception, which was not contained in this libel. THE LORDS pronounced by interlocutor, after the matter had been sufficiently reasoned and heard over again, under the pain of amand, that the reply should be admitted, and repelled the exception; licet nonnulli dominorum in contraria fuerunt opinione, that an exception being a relevant exception to have stopped a warning, should also have stopped the succeeding in the vice; and the decret of removing was given *parte non comparente*.

In the same action, it was *excepted* by the defender, That he ought not to have been decerned to have succeeded in the vice, because the pursuer promised to let him sit still for the space of a year. The exception being found relevant by the Lords, the question was, whether the same should be admitted to be proved by writ or witnesses. THE LORDS found by interlocutor, that it being an allegiance of the promise of an year, the same might be proved by witnesses, or *prout de jure*.

*Fol. Dic. v. 2. p. 231. Colvil, MS. p. 313.*

\* \* Similar decisions were pronounced, May 1582, Monteith against Tenants, No 2. p. 8397, *voce* LOCUS POENITENTIAE, and 20th March 1629, Affleck against Mathie, No 7. p. 5409, *voce* HEREZELD.—There is a case likewise to the same effect in Erskine MS. 13th January 1592, Binning against Douglas. That MS. is not in the Advocates' Library. See APPENDIX.

1609. *January.*

MIDDLEMAS *against* FORD.

No 217.

IN an action pursued by Middlemas against Hector Ford for the price of an horse, exceeding L. 100, the LORDS found it might be proved by witnesses, and prescribed not, albeit it was not pursued within three years.

*Fol. Dic. v. 2. p. 229. Haddington, MS. No 1533.*

1609. *November 23.*

MONRO *against* MONRO.

No 218.

Found in conformity with the above.

HUCHEON MONRO, son to Monro of Tarlachie, and Monro his assignee, pursued the relict of Hucheon Ross to deliver to him twelve great cows and a bull, which the said Hucheon Ross had disposed to him, and in token thereof had