No 286.

condition that the Laird of Bedrule should have for the grazing thereof, the milk and the first calf; likeas divers others of the young breeding of the said goods were received by the pursuer; and also, how soon he heard of the poinding, viz. within a day or two thereafter, he offered to make faith that the goods were his own. Which reply was not respected, but the exception sustained; seeing the Lords found, That the goods remaining divers years together in the possession of any person, who keeped them upon his own ground, and milked and used them, and the increase thereof, all this time, as his own proper goods, the creditors of such possessors might lawfully poind them as the goods of their debtors who had kept them in their possession as their own goods divers years together; and so this presumptive qualification of property consisting in the retention of possession sundry years, was preferred to the pursuer's offering to prove himself the only true owner of the goods, as being bred upon his own heritage, and sent only in grazing to that person, who is alleged to be the defender's debtor; which reply was not found relevant, seeing the pursuer could not qualify real possession of the goods by the space of two years preceding the spuilzie, albeit he alleged the property of the same to be truly his.

In this process also, the Lords were of the mind, albeit it past not into interlocutor, That steelbow goods, being delivered by the master to his tenant at the setting of any room, after the manner of setting with steelbow, might be poinded by the tenant's creditor for the tenant's debt; and that the master would have only action against the tenants for the steelbow, at the time appointed, for delivery thereof, in respect the steelbow goods, being either corn or cattle, became the tenant's, seeing every year they were changed; and the first which were delivered to the tenant by the master could not probably be extant, in respect of the alteration by the course of years, which alteration made the same to become absolutely the tenant's own, and subject to his debt.

Act. *Hart.* Alt. *Belshes.* Clerk, *Gibson.*

Fol. Dic. v. 2. p. 160. *Durie, p.* 151.

1665. *January* 27.

Sir John Scot and Walter Scot *against* Sir John Fletcher.

No 287.

In a process for restitution of a book, the pursuer was obliged to condescend *quomodo desiit possidere.*

Walter Scot, as being assignee by Sir John Scot of Scotstarvet to an Atlas Major, of the late edition, pursues Sir John Fletcher for delivering thereof, as belonging to the pursuer, and now in his hand. The defender *answered, Non relevat*, unless it were condescended *quo titulo*; for if it came in the defender's hands by emption or gift, it is his own; and *in molibus possessio præsumit titulum*; seeing, in these, writ nor witnesses use not to be interposed; and

none can seek recovery of such, unless he condescend *quo modo dessiit possedere*; else all commerce would be destroyed; and whoever could prove that once any thing was his, might recover it *per mille manus*, unless they instruct their title to it. 2*do*, Though it should be condescended that they were lent, yet it must be proved only *scrito vel juramento*, being a matter above an hundred pounds. The pursuer *answered*, That in liquid sums or promises, witnesses are not receivable above that sum; but, *in corporibus* or facts, as in bargains of victual, made and delivered, witnesses are sufficient, though for greater value. No 287.

THE LORDS found, The pursuer behoved to condescend upon the way the books were delivered; and found it probable by witnesses.

Fol. Dic. v. 2. p. 161. Stair, v. 1. p. 258.

*** Newbyth reports this case:

1665. *January* 28.—WALTER SCOT having right by assignation from his father, Sir John Scot of Scotstarvet, to six volumes of Atlas Major, which the said Sir John caused reprint, and made some voyages to Holland for that effect; after the date of which assignation, the said Sir John did lend to Sir John Fletcher, at his earnest desire, the said six volumes; and now pursues him for redelivery thereof; the time of calling of which action, the question was touching what was necessary to be proved in the said summons; for it was *alleged* by Walter Scot the pursuer, That it was sufficient for him to say and prove, that the books were his, and that they were in Sir John Fletcher's possession; or else, *quod dolo desiit possidere*, and *rei vindicatione* to pursue for restitution of his own goods, without any necessity for him to prove that they were lent to Sir John Fletcher, any other way than by his own declaration: To which it was *answered*, That where the party that delivers the goods is pursuing for redelivery, in that case, it is not sufficient for him to say, that the goods are in the defender's possession, and that he had once a right to them; but he must prove the delivery, and *ex qua causa* they were delivered; which can only be probable *scripto vel juramento*. THE LORDS repelled the defence, and found the summons probable *pro ut de jure*, in regard the subject of controversy was books *et sic inter mobilia*.

Newbyth, MS. p. 22.

1665. *December* 12. RAMSAY *against* WILSON. No 288.

POSSESSION presumes property in moveables, but yields to stronger contrary presumptions.

Fol. Dic. v. 2. p. 161. Stair.

*** This case is No 5. p. 9114, *voce* MOVEABLES.