No 297.

the deponent, and that Mr Byres was to send them from the Ely to Anstruther by sea: That he was not present at any other bargain or communing betwixt the parties: That he knew the deals were sent by Mr Byres to Anstruther, and there received by Innergelly's servant, who told the deponent that he had numbered them on the shore of Anstruther, as they were put on the wains, and that they then fell short betwixt 30 and 40, or 40 and 50 of the number sent afterwards in a note by Mr Byres to Innergelly. Further deponed, That the quantity Innergelly was to have got, was 300. And further deponed, as to the battons charged in the accompt, he knew Innergelly had received battons at sundry times from Mr Byres, though he did not mind the number or prices. Deponed as to the article of double trees, he knew that Innergelly had got from Byres such trees, though he was not positive as to the time, quantity, or number. And being interrogated on the part of Innergelly, what he remembered was the price of double trees before the commencement of the war with France? Deponed, That he would have bought a quantity of the picked trees for 22d. the piece."

After leading these witnesses, the pursuer referred the libel to the defenders' oaths, and the LORD ORDINARY, 23d January 1749, "found the pursuer having adduced witnesses to prove the accompt to Lundin, she could not now recur to his oath." And 25th, "found that Innergelly was not bound to depone in this cause, seeing the pursuer had undertaken a proof by witnesses, and had accordingly adduced a proof thereon, and 25th February, adhered."

Cited in a reclaiming bill, Voet de jurejurando, par. 4. l. 11. Cod. h. t. Stair, Tit. Probation by writ.

In the answers, these decisions, 1st July 1574, Earl of Sutherland against the Earl of Caithness, No 231. p. 12123.; 20th January 1575, Glenbervy against Udney, No 232. p. 12123.; 15th June 1622, Lord Roslin against Lord Hatton, No 242. p. 12128.; 26th February 1686, Horn against Strachan, No 281. p. 12146.; 29th January 1639, Lady Westmoreland against Lady Home, No 268. p. 12139.

THE LORDS found that the parties, notwithstanding the examination of one witness against each of them, might yet be obliged to depone.

Act. *A. Hamilton.* Alt. *D. Greme.* Clerk, *Forbes.*

D. Falconer, v. 1. *No* 193. *p.* 258.

1751. *November* 27. JOHN GRAHAM *against* WILLIAM SMITH.

No 298.
A person appearing in an action of sale, tho' not

JOHN GRAHAM, purchaser of Crowdieknows at a judicial sale, pursued William Smith as a possessor to remove.

Answered, He is a wadsetter, and entitled to retain his possession till redeemed.

Pleaded for the pursuer, The wadsetter was party to the decreet of ranking and sale, where he was ranked for the sum secured; and his father, who was originally called, and to whom he succeeded, deponed on the verity of the debt; having therefore taken himself to the debt, he cannot keep the possession.

No 298.
properly summoned, cannot afterwards object to the decree pronounced.

Pleaded for the defender, The decreet of ranking is in absence as to him; Patrick Smith, his father, being a real creditor, ought to have been specially called, which was not done; the decreet shews he appeared in the improbation and produced, but did not appear in the ranking for his interest; only, he having another debt, a commission was granted for him to depone on the verity thereof; and having produced in the improbation, he had been advised to add, this was a true debt; Patrick Smith died, and the defender was never called, so the whole procedure is null.

On pointing out in the decreet of ranking a petition for a number of the creditors, amongst whose names in the title was that of this defender, which was sisting himself;

THE LORDS repelled the objections against the decreet of sale, and decerned in the removing.

Act. *Ferguson*. Alt. *R. Craigie*. Clerk, *Murray*.
Fol. Dic. v. 4. *p.* 150. *D. Falconer, v.* 2. *No* 236. *p.* 289.

*** Kilkerran reports this case:

WHERE a ranking and sale is pursued of an estate, on part of which one has a wadset, the wadsetter may object to the sale of his wadset lands; which will be sustained, and all that can be sold will be the reversion; and the purchaser of the reversion cannot remove the wadsetter, without using the order of redemption in terms of the wadset. But should the wadsetter appear, and, without objecting to the sale, depone upon the verity of his debt, and crave and obtain a preference for his wadset-sum, in that case, the lands being sold, the purchaser may remove the wadsetter without using the order of redemption, which the wadsetter dispenses with, by his betaking himself to a preference as creditor in the wadset-money.

Accordingly, in the sale of the lands and estate of Crowdieknow, pursued by Sir William Maxwell of Springkell, against Bell of Crowdieknow, John Graham, now of Crowdieknow, became purchaser. Patrick Smith, who had a proper wadset of the lands of Netheralbie, part of the subject sold, redeemable on payment of 13,000 merks, having compeared and produced his wadset, and craved to be preferred for the said wadset-sum; and having deponed on the verity of his debt, was preferred accordingly. When thereafter a removing, at the instance of the purchaser, was pursued against William Smith the heir of the wadsetter, from the said wadset-lands, his defence was, That he could not be removed, in respect no order of redemption had been used against

No 298.

him, till which was done, and the redemption declared, he could not be dispossessed of his wadset.

THE LORDS "repelled the defence, and decerned in the removing." See RANKING and SALE.

Kilkerran, (RANKING & SALE.). *No* 15. *p*. 474.

1765. *November* 13. ARCHIBALD CAMPBELL *against* JAMES YATES.

No 299. Whether prescription may be pleaded after litiscontestation?

IN an action for the price of a quantity of porter, the defender allowed decree to go in absence before the Sheriff. The charge having been suspended, and the furnishing denied, a proof was led, in which two witnesses deponed to the furnishing, and that it was stated in the charger's books accordingly.

Pleaded for the suspender; The accompt is prescribed *quoad modum probandi*, and it is incumbent upon the charger to prove resting owing, by writing or oath.

Answered; The triennial prescription does not operate *ipso jure*. It only affords an exception, which ought to have been pleaded before the Sheriff; or, at least, stated in the suspension, before the proof was taken.

2do, The suspender does not plead payment, but denies the delivery, a defence inconsistent with payment. And, however a proof of resting owing might have been incompetent by parole evidence, the delivery may be proved in that manner. Accordingly, it has been so proved, and resting owing must be implied from the denial of delivery; for the suspender cannot be allowed to allege payment of articles, which he has affirmed were never delivered.

"THE LORDS found the articles sufficiently proved by the testimonies of the witnesses, referring to the charger's books."

Act. *Lockhart*. Alt. *Crosbie*.

G. F. *Fac. Col. No* 16. *p*. 226.

*** The Title PROCESS is continued in Vol. XXIX.