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.

2*do*, 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.