No 212. Mudie is not at liberty, by every competent mean of proof, to establish the mandate he received from Ouchterlony, to make the purchase for his behoof; and so was determined in the cases Tweedie *contra* Loch, Skene *contra* Balfour, Ramsay and Rigg *contra* Maxwell, all lately under the consideration of the Court, (See Appendix). And theprinciples of the civil law, under the title *De Mandato*, are perfectly agreeable to these decisions.

Answered for Ouchterlony's Representatives: Mandates or commissions are commonly given in writing: This practice proceeds from the general sense of the law: Mandates are only probable by writ or oath; and it is consistent with reason they should be so, as the terms of a verbal commission, like a verbal promise, may easily be mistaken by witnesses, and proof of mandates has been often limited to writ or oath, long prior to the act 1696, particularly in these cases observed by Durie, 13th Feb. 1638, ——— *contra* ———, No 203. p. 12397.; 28th Nov. 1634. Brown *contra* Hamilton, No 204. p. 12398.; and 15th June 1688, Lague *contra* Vauss, No 212. p. 12402.: That, whether Mudie or Ouchterlony is to be considered as the trustee, makes no distinction in the present case, as the intention of the legislature, by act 25th 1696, could not be to give a benefit to the trustee, which it denied to the truster; and, if writ or oath only could prove the trust against the one, no other mean of proof can be competent against the other.

'The Lords remitted to the Lord Ordinary to allow a proof.'

For Mudie, *Lockhart*. For Ouchterlony, *D. Rae*. Clerk, ———

A. E. *Fol. Dic. v.* 4. *p.* 160, *Fac. Col.* 36. *p.* 60.

1766. *June* 27.

Dr Robert Herriot *against* Alexander Farquharson, Trustee for Adam and Thomas Fairholme's Creditors.

No 213. Accession to a trust-deed was found to be sufficiently proved by letters from the creditors authorising their agent to concur with the acceding creditors, joined to the agent's attendance at their meeting, and concurring in their measures.

Act. *Ilay Campbell*. Alt. *Macqueen*.

G. F. *Fol. Dic. v.* 4. *p.* 160. *Fac. Col. No* 39. *p.* 267.

1791. *May* 7. Trustees of Croll *against* Robertson.

No 214. Accession to a trust was found sufficiently proved, by the creditor having attended a roup of the bankrupt's effects, called by the trustees, bought several

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.

No 215.

HARIOT sued Agnes Cuningham for delivery of a gown, petticoat, and table-cloth, his property, of which he alleged she had got possesion 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.

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

SECT. XII.

Verbal Contracts.

1581. *December* 12. FRASER *against* LESLIE.

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.

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 vitious 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 vitious 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 allegeance. The contrary was