

THE LORDS repelled the first and second defences; and found, That albeit the Captain might have hypothecated his ship or out-reik for the necessary expenses wared upon her, yet that he could not sell the same, and that *de facto* he did not sell the same; because the pursuer offered to prove he sold them at Leith after his return, and found the same probable by witnesses, and preferred the pursuer in probation thereof; and in respect of so unwarrantable a way of disposing, they would neither allow retention nor compensation, but left the defender to make his application to the Exchequer for his payment.

*Stair, v. 1. p. 489.*

No 622.

1670. February 16.

INGLIS against INGLIS.

JOHN INGLIS did pursue Sir David Inglis for L. 353, as the price of a pair of organs belonging to him, as moveable heirship which were in his father's possession the time of his death. It was *alleged* for the defender, That the said organs being *inter mobilia*, and possessed by him by the space of 24 years, the pursuer could have no action for the same, unless he could prove *scripto vel juramento*, that they did belong to him or his father, to whom he was heir. THE LORDS considering this as a general case, did find, that it was a sufficient title for an heir or executor to pursue for moveables, they offering to prove, that they were in the possession of the defunct, whom they represent, the time of his death; which being proved, the possessors were liable to restore the same, unless they could allege, and prove, that they had acquired the same by a legal right.

*Fol. Dic. v. 2. p. 270. Gosford, MS. p. 105.*

No 623.

The Lords found an heir or executor entitled to pursue a *rei vindicatio* of moveables that were in possession of the predecessor when he died; which being proved, the defender must restore, unless he can prove how he acquired them.

1672. February 3. Scot of Gorrinberry against ELLIOT.

GORRINBERRY, as executor to his father, pursues Adam Elliot for restitution, or the value of ninescore sheep, which he carried away off the ground of Gorrinberry, and which belonged to the pursuer's father. The defender *alleged*, That the libel is not relevant, because possession in moveables presumes a title, seeing there use not witnesses or writ to be adhibited in the commerce of moveables, and therefore restitution of moveables is never sustained upon naked intromission; but it must be condescended and proved, not only that the pursuer had possession, but *quomodo desiit possidere*, and that the goods were either violently taken away by spuilzie, stolen, or strayed, set, or impignorated; but if intromission only with moveables were sufficient to infer restitution, all the bargains made for moveables would force the acquirers to restore, unless

No 624.

In moveables lawful possession presumes property, unless the possession be proved to be such as could not be by bargain, or gift.