No 622.

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.

1670. *February* 16. INGLIS *against* INGLIS.

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.

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.

1672. *February* 3. SCOT of Gorrinberry *against* ELLIOT.

No 624.
In moveables lawful possession presumes property, unless the possession be proved to be such as could not be by bargain, or gift.

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.

they could prove the cause of their intromission, which would marr all commerce.

THE LORDS found the libel not to be proved otherways than by the defender's oath, that thereby he might qualify the cause of his intromission, and would admit no witnesses, unless the pursuer condescend upon the way how he ceased to possess, which might take off all presumption that the intromission was not upon any bargain or gift, but was vicious.

Fol. Dic. v. 2. p. 270. Stair, v. 2. p. 59.

*** A similar case is reported 27th January 1665, Scot against Fletcher, No 287. p. 11616, *voce* PRESUMPTION.

1672. *June* 5. MUNGO WOOD *against* KELLO, (or ROLLO).

No 625.
One witness with a merchant's account and his own oath in supplement upon the price and delivery of goods found sufficient to constitute a debt against the buyer's executors, although above L. 100.

IN a pursuit at Mungo's instance for merchant ware, the delivery thereof being admitted to his probation, having only produced for proving thereof his own compt-book, bearing the particulars, and adduced one witness who had at that time been his own apprentice, but was now out of his service; and, in supplement, offering to give his own oath upon the verity of his account, both as to the particulars delivered, and as to the prices;

It was questioned amongst the LORDS, if that was a sufficient probation to constitute a debt above L. 100? THE LORDS did find the same sufficient, in respect of the great prejudice that merchants might sustain if they were restricted to a full probation, especially if the parties were dead; and therefore decerned the probation by one witness, being *semiplena*, and the compt-book, with the merchant's oath in supplement, was sufficient to make it a full probation.

Fol. Dic. v. 2. p. 262. Gosford, MS. No 487. p. 256.

*** Stair reports this case:

MUNGO WOOD, merchant in Edinburgh, pursues Rollo of Powhouse, as heir to his father, for payment of a merchant-account, current for several years, whereof the last articles were within three years of the pursuit.

THE LORDS found the whole probable by witnesses; and, at the advising of the cause, the whole articles of the account being fourteen, they were all proved by two witnesses, except some few in the middle of the account, not exceeding L. 10 Scots, which were proved but by one witness; and seeing umquhile Powhouse died shortly after the taking on of the account, so that his oath could not be taken;

THE LORDS took the pursuer's oath in supplement; and decerned for the whole; one of the witnesses was the receiver of the goods, and the other had been the merchant's servant at the time, who gave them off.

Stair, v. 2. p. 83.