No 620. time of the alleged intromission, to whose executors the half of the goods will pertain. It was *alleged* by the pursuer, That she offered her to prove, that her husband was dead, and that she was a free woman and widow, and that the sheep were her own proper goods, and she being *in libello*, ought to be preferred; and the defender *contended*, That he ought to be preferred, in respect he offers him to prove the husband to be living, and being presumed to be in life; notwithstanding, the Lords preferred the pursuer.

Auchinleck, MS. p. 156.

1665. *July* 14. Mathieson *against* Gib.

No 621.
Witnesses admitted to prove a bargain of victual after 12 years.

James Mathieson having obtained a decreet before the Commissaries of Edinburgh against Gib, he suspends, and alleges it was not a cause consistorial, being a bargain of victual, and that it was not probable any other ways but by his oath, now after 12 or 13 years, in respect of the act of Parliament anent house mails and others, which comprehends this case.

The Lords repelled the allegeance, and found that bargain of victual not comprehended under that act of Parliament.

Stair, v. 1. *p.* 297.

1667. *November* 28. Captain Bood *against* Strachan.

No 622.
That a person sold the articles of a ship belonging to another, allowed to be proved by witnesses.

Captain Bood, Captain of one of his Majesty's frigates, pursues George Strachan, who had commanded that frigate for a time, and was sent a voyage therewith, from Brassie Sound to London, to restore a part of the out-reik of the ship, which he had not delivered, but had excepted in his discharge as being worn, stolen, or lost; and now it was offered to be proved, that he sold and disponed upon the same particulars he so reserved. The defender *alleged*, Absolvitor from such particulars as he condescended upon, because he did ware out a considerable sum of money for repairing the out-reik, and necessaries to the ship during the voyage, for which, in case of necessity, he might have sold a part of the out-reik. 2*do*, Albeit he might not have sold the same, yet he may retain, or compense the price thereof, with what he wared out necessarily and profitably for the out-reik of the ship. 3*tio*, He offered him to prove, that such parts of the out-reik in question as he should condescend upon, were worn and stolen, which being his defence, he ought to be preferred in the probation unto the pursuer, who ought to have no other probation against him, being a person intrusted, but his own oath, much less a contrary probation by witnesses, that they were not lost, but disposed upon by the defender.

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